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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 281

IN THE MATTER OF
GRANADA APARTMENTS, INC.,
Debtor.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.,
Respondents.

No. 282

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS.

Counsel for Respondents:
VINCENT O'BRIEN,
JOHN MERRILL BAKER,
TRACY WILSON BUCKINGHAM,
(*Defrees, Buckingham, Fiske & O'Brien*),
105 South La Salle Street,
Chicago, Illinois.

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MAY IT PLEASE THE COURT:

This is a case in which the law points are few and comparatively simple. As the case really turns on the facts and as the petitioner's statement is misleading and materially inadequate we believe that we can be of maximum assistance to the Court by setting forth in some detail a correct chronological record statement of what was done by respondents in connection with the debtor's estate and why it was done.

STATEMENT OF THE CASE.

Prior to the Current Bankruptcy Proceedings.

The Granada Hotel was one of a group of three built in 1924 by Fred Mateer. The other two are known as the Lincoln Park Manor Hotel and the Arlington Hotel. Arlington Hotel Corporation owned the Arlington and Lincoln Park Manor Building Corporation owned the Lincoln Park Manor. Granada Hotel Corporation owned the Granada. Mateer owned substantially all of the capital stock of Mateer Hotels, Inc., which in turn then owned substantially all of the common stock of the three hotel corporations (R. 633).

In 1924 the Arlington and Lincoln Park Manor Hotels were built with the proceeds of separate construction loans respectively made by the owner corporations and respectively secured by trust deeds to Chicago Trust Company, as Trustee. At that time the Granada Hotel basement was constructed, equipped and covered over. It housed the central machinery for supplying heat, refrigeration, hot and cold water to itself and to the other two hotels through pipes connected with them by tunnels. Sometime after the Arlington and Lincoln Park Manor Hotels were in operation the Granada Hotel itself was built (R. 402). Part of the cost was provided by the proceeds of first mortgage bonds aggregating $550,000 made by Granada Hotel Corporation (predecessor in title of the debtor) secured by a trust deed in the nature of a mortgage also to Chicago Trust Company, as Trustee. Most of the furniture, furnishings and equipment to be used in the hotel was purchased by Granada Hotel Corporation from Albert Pick & Company for $107,096.84, of which $24,000 was paid in

cash and the balance by notes aggregating $83,096.84, secured by a chattel mortgage on the personalty so purchased (R. 552). Some of the equipment and furniture in the premises had not been furnished by Pick and was not encumbered (R. 500).

In 1924 heat, water, refrigeration and other services were provided for the three hotels under separate written agreements with Mateer Hotels, Inc. to run for thirteen years, compensation to be on a basis of cost plus 15% for profit. It was provided in each agreement that no amendment or change might be made unless first approved by the Indenture Trustee (R. 639, 403, 399).

On September 1, 1928 the Granada first mortgage was refunded by a new first mortgage of $525,000, of which $25,000 was subordinated. The new first mortgage was underwritten 60% by Cody Trust Company and 40% by Chicago Trust Company, which again was named as Indenture Trustee. A new second mortgage of $360,000 was also made at that time (R. 474, 505).

Though the record is silent as to the occasion for refinancing it is evident that it was not done "to protect Chicago Trust Company and all other persons who participated by placing their names in the prospectus to the bondholders in 1924"; for, contrary to Petitioner's Findings 14, 15 and 16 (R. 773) it does not appear that the 1924 prospectus had represented to the bondholders that the personalty was part of the security for the bond issue loan (see prospectus, R. 334; Transcript 762). Nor is there any evidence that the personalty was to be paid for out of the proceeds of the loan.

In the first instance Chicago Trust Company, as underwriter, intended in 1928 to require that the loan agreement provide for the retirement of the Pick chattel mortgage, but it appearing that the proceeds of the loan would be insufficient to pay the Pick indebtedness and to retire the old first

mortgage indebtedness, Chicago Trust Company upon being persuaded by Cody Trust Company that the Pick mortgage was invalid and that the attorneys for Cody Trust Company could establish its invalidity, did not further insist upon that requirement (R. 499). Rather, it entered into an agreement with Cody Trust Company which, among other things, provided that if a first chattel mortgage on the furniture could not be delivered by February 9, 1925 as additional security for the new first mortgage bond issue, second mortgage bonds up to $50,000 would be left on deposit with Chicago Trust Company to protect them until such time as said first chattel mortgage was executed and delivered. $30,000 were actually deposited (R. 536).* Cody Trust Company did not undertake to *pay* the Pick indebtedness.

The bonds which were left on deposit were retained when the Pick claim was not defeated. No provision was made for participation of these bonds in the plan submitted by the committee in these 77-B proceedings. The committee procured an order on July 14, 1937 that the bonds so deposited were to be cancelled on the entry of the final decree (R. 100, 348).

Contrary to the statement at page 49 of petitioner's brief upon the merits, Defrees, Buckingham, Jones & Hoffman were not the attorneys who said that the Pick chattel mortgage was invalid or who were retained by Cody Trust Company to establish its invalidity.

Both Chicago Trust Company and Cody Trust Company represented in their separate prospectuses relating to the 1928 first mortgage bond issue that "in addition, and furnishing added security, the furniture and equipment in the Granada are valued at $88,000" (R. 516, 334).

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* The pages at which this and certain other court Trustee's Exhibits were offered do not appear of record. Where the pages do appear they are given.

There is no evidence showing the value in 1928 of the personalty purchased from dealers other than Albert Pick & Company, but prior to the making of the refunding loans the sum of $53,000 had been paid on account of the Pick indebtedness (R. 552). It may well be that what was meant was that the value of the Corporation's equity in the furniture and equipment purchased from Pick plus the value of any furniture and equipment bought from others was in fact $88,000, and thus that the representation was true.

Whatever was meant, and whether the representation was true or false, the fact is that the attorney respondents did not learn of the contents of the circular until it was produced at the trial and, as will be shown hereafter, there is no evidence that any of the respondents knew of it before then.

In the spring of 1929 Granada Hotel Corporation conveyed all of its property to Granada Apartments, Inc., then organized, which assumed and agreed to pay the first and second mortgage indebtedness then outstanding but which did not assume or agree to pay the indebtedness to Albert Pick & Company. Defrees, Buckingham, Jones & Hoffman prepared the legal papers for the incorporation of the new company (R. 496).

On November 13, 1928 a decree of sale was entered in proceedings which had been brought in the Circuit Court of Cook County, Illinois, by Albert Pick & Company against Granada Hotel Corporation to foreclose its chattel mortgage (R. 553). On November 23, 1928 one Wenstrand, a nominee of Cody Trust Company, claiming to own the personal property described in that chattel mortgage by virtue of a purchase made by him July 7, 1928 at a Sheriff's sale under an execution against Granada Hotel Corporation, filed his complaint in the United States District Court to restrain the sale under Pick's foreclosure decree (R. 553).

His attorneys below were Mort D. and Frank Goldberg who had represented to Cody Trust Company that the Pick chattel mortgage was invalid (see *Wenstrand* v. *Albert Pick & Co.*, 38 Fed. (2d) 25). In this Court, his attorney was Daniel M. Dever (see *Wenstrand* v. *Albert Pick & Co.*, 281 U. S. 768).

Albert Pick & Company thereupon filed its suggestion of damages against Wenstrand and his surety, Indemnity Insurance Company of North America, in relation to the injunction bonds which they had furnished. It claimed attorneys' fees and damages on account of depreciation in sales value of the furniture pending the litigation (R. 359).

When the validity of the Pick chattel mortgage had been so established as against Wenstrand, Pick proceeded to sale under the foreclosure decree on June 11, 1930 (R. 554).

On June 10, 1930 the Indenture Trustee under the Granada mortgage, wishing to prevent the disorderly removal of the furniture and any removal of the built-in equipment which it contended to be fixtures and thus part of the first mortgage security, had William A. Thuma file a bill in the Superior Court of Cook County against Granada Hotel Corporation and Granada Apartments, Inc., on items in default under the second mortgage, there being no defaults under the first mortgage (R. 475). On his motion Chicago Title and Trust Company was appointed receiver. The receiver was directed not to interfere with the existing management but merely to collect the net income. January 12, 1934, the receiver was directed to take full possession of the Granada property. The Trustee under the first mortgage was joined as a defendant to prevent any claim that the receiver was appointed for Thuma's exclusive benefit. Thus the prior interest of the first mortgage trustee in the rents and income was preserved (R. 424).

Defrees, Buckingham, Jones & Hoffman represented both Thuma and the Trustee.

Pick intervened to claim the property covered by its foreclosure decree. By order of court entered June 24, 1930 the receiver surrendered to Pick possession of the loose furniture over a period of time which permitted the refurnishing of the apartments without loss of tenants (R. 475). The replacement furniture was purchased by Granada Apartments, Inc., for $41,000 on a conditional sales contract for $35,000, reduced to $3,000 at the time of the filing of the present 77B petition (R. 480). The conditional sales contract was held by Continental Illinois National Bank & Trust Company which later filed a claim in the bankruptcy proceeding for that balance. The plan prepared by respondents provided for the payment of that claim in cash.

The Superior Court reserved jurisdiction to determine whether the equipment built in during the construction of the hotel belonged to Pick or whether it was part of the real estate first mortgage security (R. 475).

The equipment consisted of large kitchen cases which were delivered to the hotel knocked down. Provision for them had been made in the original building plans and they were specially built for the premises by the manufacturer and installed during the construction of the building. Each case contained a refrigeration unit which was connected up with the central brine system by means of pipes extending through the corridor walls. There were also in-a-door beds and the wooden paneling to which they were attached was especially designed for that type of bed. No manufacturer other than Pick's subsidiary made the same bed or kitchen case and the subsidiary was no longer in business nor were any more of the kitchen cases or beds available. The china cases were likewise installed during the construction of the building and were used as "dividers" to separate the dining portion from the kitchen portion of each room in which used (R. 359, 369).

On June 15, 1932 decree was entered in favor of Albert Pick & Company as to this equipment (R. 552). On appeal by the Indenture Trustee, the decree was affirmed by the Appellate Court of Illinois and certiorari was denied by the Supreme Court of Illinois in 1933 (R. 476).

In the meantime and on July 25, 1931 Chicago Trust Company had consolidated with Central Trust Company of Illinois to form Central Republic Trust Company which thereby became successor Trustee under the first mortg. ge trust deed and was substituted for Chicago Trust Company as defendant in said Superior Court proceedings (R. 475).

In 1932 Central Republic Trust Company had made a large loan ($80,000,000 to $90,000,000, R. 354) from Reconstruction Finance Corporation, to secure which it had pledged all of its assets (R. 476). It ceased to do a banking business but continued to conduct its trust business (R. 183, 194). By 1933 Cody Trust Company was insolvent (R. 476).

On July 31, 1933, an inventory and appraisal of the furniture and equipment in the Granada Hotel was procured by the agent of the receiver, Chicago Title and Trust Company, from independent appraisers. It showed that the value of the kitchen and china cases, in-a-door beds and the ozite and carpeting was $18,000 based on the cost of replacement with articles of identical quality less depreciation, that is, the market value to the hotel based on the value new, less depreciation since 1924, the date of installation (R. 640, 421). The District Court, on the trial below, refused to admit the appraisal because of the basis on which it was made, taking the position that the value of the property to the estate was its "junk" value when removed, rather than its value in place in the hotel (R. 361, 362, 421).

After certiorari was denied negotiations to settle the Pick claim were begun. Pick finally agreed to take $22,500

for the built-in equipment, ozite and carpeting, to satisfy a deficiency decree in excess of $50,000 against Granada Hotel Corporation, to dismiss proceedings then pending for the appointment of a receiver for that corporation and to waive its claim for three years rent for the use of the property pending the state court litigation. Pick was then informed that there was not sufficient cash on hand to pay the settlement price in full and that some arrangement would have to be made to raise the necessary funds. The only person who might have been interested in lending the money was Indemnity Insurance Company of North America. Accordingly we again talked with counsel for Albert Pick & Company, explained that we could not get the money unless the Surety Company would lend on a receiver's certificate of indebtedness which we might be able to get it to do if the suggestion of damages was dismissed. We assigned legal reasons why damages could not be proved (R. 477). Pick then agreed to dismiss its suggestion of damages (R. 363). Thereupon we talked to counsel for the Surety Company which, after some delay, agreed to advance $11,500 on security of a receiver's certificate of indebtedness, the suggestion of damages to be dismissed (R. 476, 477).

On August 11, 1933, Central Republic Trust Company, as Trustee, filed its petition in the Superior Court proceedings and asked that the receiver, Chicago Title & Trust Company, be authorized to make the settlement with Pick and for that purpose to issue a receiver's certificate of indebtedness for $11,500. The court was not informed by the petition that Indemnity Insurance Company of North America was to purchase the receiver's certificate or that it was to be released of its liability on the suggestion of damages. The Court was informed by the petition of the value of the property, that its removal would not only injure the premises but result in the loss of most, if not all, of the tenants and

that it would take two or more months in which to remove and replace the property. Its attention was also called to Pick's claim for rental for the use of the property for more than three years pending the litigation, which claim the Court had theretofore reserved jurisdiction to determine. It was advised that Pick's deficiency decree against Granada Hotel Corporation would be satisfied and that pending proceedings against that corporation for the appointment of a receiver would be dismissed. During the trial of the fixture litigation the judge had personally visited the premises to witness the effect of the removal of these items which at his direction had been taken out of one of the apartments (R. 608, 377). The settlement was approved and the receiver's certificate of indebtedness was issued and purchased by Indemnity Insurance Company of North America. The suggestion of damages was dismissed.

In July, 1933 Central Republic Trust Company, as Trustee under the first mortgage trust deed, filed its cross-bill of complaint in the same proceedings against the defendants, Granada Apartments, Inc., and Granada Hotel Corporation and others, to foreclose the first mortgage on behalf of all bondholders on account of defaults which occurred in 1932. At that time Defrees, Buckingham, Jones & Hoffman withdrew as counsel for Thuma (R. 480).

Hiram Cody and Riddle were indemnitors in respect of the bonds given by Wenstrand in the case of *Wenstrand* v. *Albert Pick & Co.* Before Indemnity Insurance Company of North America agreed to buy the receiver's certificate it had entered into an agreement with said indemnitors that if the certificate were not paid off, they would reimburse the Surety Company. But these facts were not known by Central Republic Trust Company, by City National Bank and Trust Company, by the bank members of the Committee (R. 221, 230), or by respondent attorneys until the trial of the proceedings below (R. 499).

The Surety Company had produced the agreements from its home office files during its separate litigation with the Court Trustee.

The petitioner refers to testimony of O'Brien at R. 476 to show that the attorneys did have knowledge of these facts. But O'Brien was then testifying at the separate fee hearing before the Master after the conclusion of the trial before the Court. The knowledge of the transaction of which he spoke before the Master was the knowledge gained at the prior hearing before the Court.

On October 5, 1932, City National Bank and Trust Company of Chicago was organized. It took over the deposit liabilities of Central Republic Trust Company and from that date on provided space and personnel required in servicing the trusts of Central Republic Trust Company. It maintained a reorganization division and furnished facilities and personnel to committees, consisting of officers and employees of the bank, and formed for the protection of the holders of defaulted first mortgage bonds which had been underwritten by Chicago Trust Company or Central Trust Company of Illinois. By agreement with the committees (including the one in this case), the bank was to be reimbursed for the cost of furnishing facilities and personnel and it was to act as depositary. The reorganization division was not organized to make money nor did it try to. Its effort was merely to get out its cost (R. 211). The cost was determined by the number of people employed in the reorganization department, the space occupied, the facilities placed at the disposal of the committee, including regular office service, telephone, filing services, credit information, insurance data and service, stenographic help and other items. It did not include anything for the bank members of the committee individually. None of the members was to receive any fees. The cost was apportioned to specific issues on the basis of the size of

the issue as compared to the aggregate total of the bonds serviced under all issues (R. 469). By the terms of the deposit agreement, the committee was entitled to be reimbursed for all disbursements, expenses and liabilities, including counsel fees made or incurred by it or its agents in exercising any powers and performing any duties (R. 21, 34).

In the case of the Granada, the bank caused a committee to be formed on April 25, 1933, consisting of two of its officers, William G. Sturm and Charles S. Tuttle, neither of whom had had any connection with Chicago Trust Company or anything to do with the underwriting of the bonds (R. 201, 216), and Edward S. Clark and Lewis W. Riddle, both of whom were then officers of Cody Trust Company (R. 9). Later Clark resigned and Albert J. Peterson was appointed in his place and E. A. Kilmer was added to the committee. Peterson had been an employee of Cody Trust Company and Kilmer was a dealer in Elkhart, Indiana, who had distributed some of the bonds underwritten by Cody Trust Company. Defrees, Buckingham, Jones & Hoffman who also represented the Committees and the Indenture Trustees for the Arlington and Lincoln Park Manor, were retained by the Granada committee as its counsel (R. 487).

Petitioner refers to Johnson's testimony (R. 436) as contrary. The unprinted transcript (928-929) shows his additional answer as follows:

> "Well, I think, to make this thing clear, you see the committee—the record shows the committee was formed in April, 1933, and these proceedings were started away back in 1932; as a matter of fact, that appeal was taken up in 1932. I think this proceeding goes to 1930 and 1931."

Johnson was referring to the original retention of counsel in the Thuma-Granada fixture litigation and not to the later retention of counsel in 1933 by the committee.

By 1933 Mateer and Mateer Hotels, Inc. had lost control of all three properties. The common stock of Granada Apartments, Inc. was then owned by Cody Trust Company which also owned a substantial amount of the Granada second mortgage bonds. By December, 1933 title to these bonds and to the stock had passed to Charles H. Albers, the receiver of Cody Trust Company. The Arlington Hotel had been sold to one Barton in 1927, but in 1933 was owned by Warren-Hart Apartments, Inc. The title to the Lincoln Park Manor Hotel had been acquired by one Gehm through foreclosure proceedings on a second mortgage which he had held.

Cody Trust Company had had a substantial investment in the Granada and from time to time had raised the amount charged the Arlington by the Granada for heat, water and refrigeration to as much as $900 per month, thus, without the consent of the indenture trustee required by the original contract (R. 639, 403), increasing the rate which had existed in 1924 (R. 404, 405). In December of 1933, while Chicago Title and Trust Company was receiver of the Granada and while the owner, Warren-Hart Apartments, Inc., was in possession of the Arlington, the charge for heat, water and refrigeration furnished to the Arlington was fixed at $600 per month. Central Republic Trust Company, trustee under both the Arlington and Granada issues, participated in the conferences by which this was done and made due investigation to determine that the amount fixed was reasonable and proper (R. 295-299). On January 4, 1934, a written agreement was executed by Granada Apartments, Inc., and Warren-Hart Apartments Building Corporation, fixing the charge at $600 per month (R. 626, 406). This agreement was drafted by the attorneys for respondents.

On March 16, 1934 Chicago Title & Trust Company, Receiver, surrendered possession of the Granada property to Central Republic Trust Company, as Trustee, which was

directed by the Court to assume and to pay the balance due on the receiver's certificate of indebtedness, amounting to $7,011.01. When the present 77B petition was filed the balance amounted to $4,000 and Indemnity Insurance Company of North America, the holder of the certificate, filed its claim for that balance. On April 26, 1934 the final report and account of Chicago Title & Trust Company, Receiver, was filed and approved and its fees were paid in the sum of $3,000, the gross collections for the period of the receivership having been about $200,000 (R. 480).

On November 20, 1934 William L. O'Connell was appointed Receiver of Central Republic Trust Company by the Auditor of Public Accounts of the State of Illinois (R. 285), and on January 3, 1935 he resigned the trusteeship on behalf of Central Republic Trust Company in said foreclosure proceedings. On petition of the Committee filed in the foreclosure proceedings, City National Bank & Trust Company was appointed successor Trustee under the Granada first mortgage trust deed by order of Court. It entered into possession of the Granada to operate the same as successor Trustee on January 4, 1935.

On February 11, 1935 the final report and account of O'Connell on behalf of Central Republic Trust Company, as Trustee, was filed and on due notice to all parties approved by the Superior Court. The successor Trustee made no objection, the account having been correctly stated (R. 621, 377).

In the meantime City National Bank & Trust Company had likewise succeeded Central Republic Trust Company as Trustee under the Arlington first mortgage trust deed and had taken possession of the Arlington property. Its predecessor had taken possession on December 31, 1933.

So that, as of January 4, 1935, City National Bank & Trust Company of Chicago was Trustee in possession not

only of the Granada but of the Arlington. It owned none of the indebtedness of the corporations which owned those two hotels. It had no personal interest. The bonds were held by the public (R. 67, 181, 513).

As Trustee of the Granada it continued to charge the Arlington $600 a month, the amount which had been fixed in December of 1933. It continued to operate Granada as mortgagee in possession until it surrendered possession to the Court Trustee appointed in these bankruptcy proceedings.

The decree of sale upon the cross bill filed August 11, 1933, by the Trustee under the Granada first mortgage was not entered until December 18, 1936 (R. 511, 377).

Prior to that and from the time of its organization in April, 1933, the Committee had given constant attention to available plans of reorganization; for there could be no sale in the state court proceedings, except at a sacrifice, without a plan. The witness Johnson, Secretary for the Committee, testified at length on the subject (R. 425-430). Among the plans considered and investigated were the following:

No. 1. "A full foreclosure plan" through which the depositing bondholders would bid and on expiration of the 15 month redemption period procure a Master's deed. It could not be financed because there were but 60% of the bonds on deposit and thus the Committee would be required to raise cash to pay the holders of about $200,000 of non-deposited bonds their pro rata share of the sale price, in addition to the unpaid general taxes and the furniture and equipment indebtedness.

No. 2. A plan of reorganization in which the Committee and all junior interests would join, the bid to be made at a low price and to be followed by immediate redemption through control of the junior interests—it was impossible to get the junior interests together, particular difficulty being experienced in respect of the holders of the preferred stock.

No. 3. A plan by which the Indenture Trustee would bid in for all of the bondholders and at the expiration of the redemption period hold title for all of them. Early in 1934 the Appellate Court of Illinois held that the Trustee had the power and was under the duty so to bid notwithstanding the absence of express provision in the indenture. To take advantage of this decision, the foreclosure bill was amended to ask the instructions of the Court as to whether the Trustee should bid. The first mortgage bondholders were then joined as parties (R. 480). On appeal that decision was reversed by the Supreme Court of Illinois.

No. 4. 77B—From the time of its enactment in 1934 the Committee surveyed its corporate real estate issues and reorganized many of them in the Federal courts. The people who controlled the Granada title did not want a reorganization. They wanted to buy the bonds at low prices and own the property free and clear. Hence they would not bring a voluntary petition—though requested—and there were no grounds for an involuntary petition until Rosenberg had obtained a judgment and the appointment of a general receiver. That was the basis of jurisdiction for the involuntary petition below. (See "Litigation Chart", p. 93 Petitioner's Brief.)

No. 5. The sale of the deposited bonds. There was a syndicate which had acquired control of the Granada title and it claimed to control the Lincoln Park Manor title and was attempting to buy from the RFC the junior interests on the Arlington. If it was successful it planned to offer a low price for the bonds, otherwise to force foreclosure sales at which it could buy at low prices and, through control of the junior interests, redeem. It could not get the money unless all three properties could be secured. To prevent the consummation of that deal, the Bank reorganized the Arlington separately giving the RFC a 12½% participation and the plan of the syndicate fell through.

Before then, the Committees for all three properties had considered a unit reorganization which would involve getting the three titles all in one owner and the issuance of common securities to the different security holders. The Lincoln Park Manor was individually owned and 77B was

not available as a remedy. The title to the furniture and many of the first mortgage bonds were under control of a group which was unwilling to have any reorganization. The Committees concluded that separate reorganizations were necessary (R. 213).

At the time the present 77B proceedings were brought and for a long time before, all of the stock and many of the junior interests in the Granada were controlled by the same group who did not want a reorganization and who made objections to the approval of the 77B petitions below (R. 596-7, 375).

Late in 1934 three creditors brought an involuntary 77B petition against Granada Apartments, Inc. There was no equity receivership pending. There was no act of bankruptcy. The corporation itself, although requested (R. 482, 353), refused to file an answer in the nature of a voluntary petition. The Committee and City National Bank and Trust Company of Chicago opposed the proceedings only after efforts to cure the defects, and failing in that, only after advice of its counsel that a good title could not come out of those proceedings, which advice had been confirmed by the Chicago Title and Trust Company insofar as the issuance of any guarantee policy was concerned (R. 482).

This Court held that the District Court lacked jurisdiction. (*Tuttle* v. *Harris*, 297 U. S. 225.)

Neither the Committee nor the indenture trustee opposed the approval of the petitions in the present 77B proceedings (R. 341, 375, 597).

The Present Proceedings in the United States District Court.

On May 17, 1937, the 77B petitions were approved as properly filed. There were many objections to the approval of the petitions but not by the Committee nor the Indenture Trustee nor their counsel (R. 595-598). Weightstill Woods was named as temporary Trustee and ordered to take possession of the property.

The Indenture Trustee which was then in possession presented a petition showing its right to continue in possession until the Plan was confirmed (R. 600-601). Its reasons for so doing will be discussed in the Argument. When the Court stated that it would dismiss the petitions if the Indenture Trustee successfully maintained that position, it waived the point and surrendered possession in the interest of a speedy reorganization (R. 223).

The Committee brought in its Plan of Reorganization by May 24, 1937 (R. 51). It was confirmed July 14, 1937, assents from approximately 60% of the First Mortgage Bondholders having been procured and filed by the Committee (R. 102).

August 30, 1937 the Indenture Trustee filed its Report and Account (R. 111). The Report set forth much of the matter hereinabove stated and the account showed the moneys collected and disbursed by the Indenture Trustee, including the fees which it and its predecessors in trust had retained for management of the property and the fees paid to its attorneys for services in connection with matters other than the foreclosure proceedings, as heretofore related. The report, of course, made no mention of the unpaid fees which had been allowed to the Indenture Trustee by the decree of the state court in reimbursement for its services and those of its counsel rendered in the foreclosure proceedings. On June 23, 1937 the Indenture Trustee had

filed a claim and later an amendment to the claim to recover those fees.

September 9, 1937 the Court Trustee filed his answer, and objections to the claim and to the account and his counterclaim to surcharge the account (R. 127). City National Bank and Trust Company answered the counterclaim (R. 165).

Petitioner's pleading, though filed as one document, is actually in three independent and distinct parts, separately headed as (1) objections to the claim of City National, (2) counterclaim against City National and (3) objections to the account of City National.

September 14, 1937, the committee filed its petition for allowance of a reasonable amount to reimburse City National Bank and Trust Company for the use of personnel and facilities furnished to the Committee and for its services as depositary, as well as certain out-of-pocket expenses. The Committee requested no allowance for the service of its members (R. 156). At the same time, Defrees, Buckingham, Jones & Hoffman filed their petition for administrative allowances as counsel for the Committee (R. 151).

No objections were filed to the latter two petitions.

By order of September 14, 1937, the hearing on the report and account of the City National, and upon the objections thereto and counterclaim filed by the Court Trustee, was set for September 21, 1937 before the Court. The District Court, at that time, treated the claim of the Indenture Trustee as one for administrative allowances to be heard later with all the petitions which had been filed for fees and expenses (R. 863).

The hearing of the accounting proceedings was begun on September 21, 1937. It did not include the issues on the claim of the City National and the objections of the Court Trustee thereto. When the trial was concluded on October 12, 1937, an order was entered taking the report and

account, the objections thereto and the counterclaim under advisement—findings of fact, conclusions of law and briefs to be submitted. (R. 864).

Thereafter, on October 14, 1937, the claim of City National, the Court Trustee's objections thereto, and the fee petitions came on for hearing and there was an Order of Reference to a Special Master who was directed to receive and to report to the Court any evidence adduced in relation thereto.

The objections of the Court Trustee to the claim of City National were (1) that the decree allowances for its services and those of its counsel were not binding on the Federal Court; (2) that the decree was void *first* because City National and its counsel had sought *in the foreclosure proceedings* to represent conflicting interests and to act in opposite capacities; and *second* because the decree didn't run against the debtor Granada Apartments Inc., and that Granada Hotel Corporation, against which it did run, had been dissolved more than two years preceding the suit; and also (3) that City National was a trustee *de son tort* and thus neither it nor its counsel were entitled to fees, and (4) that the services or acts of City National were of no value to debtor's estate and had postponed proceedings in the Federal Court (R. 127, 128).

Pursuant to the reference evidence was adduced before the Master in support of the petitions of the Committee and its counsel and in support of the claim of City National and was returned to the court with the Master's report on October 21, 1937.

On that date, on motion of the Court Trustee, an order was entered that all of the evidence adduced by respondents before the Special Master on respondent's claim and petitions for allowances be consolidated with the accounting proceedings then under advisement, as above noted, and be considered as part of the hearing which had been

had and concluded in open court, and that they have disposition as part of said accounting proceedings (R. 712).

July 14, 1938 the trial court rendered its opinion (R. 761) and directed the Court Trustee to prepare and to present findings of fact "consistent" with what the court had stated in its opinion.

September 24, 1938 the Court Trustee presented his findings of fact to the court. Respondents filed their objections in writing September 30, 1938 (R. 722).

On May 2, 1939 the decree and the findings of fact, substantially in the same form as had been presented by the Court Trustee, were entered.

In effect the decree so entered denied the claim of City National Bank and Trust Company of Chicago on account of its fees, costs and expenses and those of its counsel incurred in the state court foreclosure; disallowed and dismissed for want of equity the petitions and claims for expenses and allowances of the Committee and the attorneys; refused to approve the report and account of the Indenture Trustee, but also refused to surcharge it; and sustained the counterclaim of the Court Trustee to the extent necessary to extinguish any and all the claims of the Indenture Trustee, the Committee and counsel (R. 794).

Proceedings in the Circuit Court of Appeals.

Respondents appealed from the decree and from all materially adverse findings (See Assignment of Errors (R. 817)).

Petitioner, at page 10 of his brief, says that respondents "argued only part of the findings mentioned by the assignment of errors." If by this he means that we failed to argue any finding or part of finding to which we assigned error, his statement is untrue and unsupported in any way except by reference to his Appendix "D". But Appendix

"D" relates only to findings or parts of findings to whic
no error was assigned.

To support our contention that the findings complaine
of were clearly erroneous we discussed the evidence, wher
any existed, and gave appropriate record references.

It is true, as stated at page 10 of the petitioner's brie
that he urged upon the Court of Appeals that the plead
ings and the *findings from the District Court* showed suc
breaches of trust as to compel the disallowance of fee
but the petitioner, as stated in the opinion of that cour
did not attempt to point out *any evidence* to support thos
findings but merely reiterated the findings themselves.

Not only that, but, as we shall show in the argument, th
breaches of trust which he urged, both in the Distric
Court and in the Circuit Court of Appeals, are quite differ
ent than those which he now claims in this Court.

The motions to dismiss appeals 6986 and 7060 made b
petitioner in the United States Circuit Court of Appeal
are discussed under our Point IV.

POINTS AND AUTHORITIES.

I.

RESPONDENTS FAITHFULLY DISCHARGED THEIR DUTIES AS FIDUCIARIES AND PERFORMED BENEFICIAL SERVICES FOR WHICH THEY ARE ENTITLED TO BE COMPENSATED.

(a) *Petitioner should not be heard upon points not raised below.*

Magruder v. *Drury*, 235 U. S. 106.

J. M. Robinson & Co. v. *Belt*, 187 U. S. 41, 23 S. Ct. 16.

(b) *The fact that the Committee was formed at the instance of the bank, and serviced by its reorganization division and that two of the members had been connected with Cody Trust Company, and two others were officers of the bank, did not deprive the Committee or the bank of the right to the allowances requested.*

Cromwell v. *Curtis*, 99 F. (2) 810 (C. C. A. 2).

In re Milwaukee Lodge No. 46, B. P. O. E., 83 F. (2) 662 (C. C. A. 7).

In re Paramount Publix Corporations, 83 F. (2) 406.

(c) *The sale by City National Bank and Trust Company as Trustee of the Granada Hotel of heat, water, and refrigeration to itself as Trustee of the Arlington Hotel at a price fair to both trusts did not constitute a breach of trust.*

French v. *Hall*, 84 N. E. 438 (Mass.).

Springfield Safe Deposit & T. Co. v. *First Unitarian Soc.*, 200 N. E. 541 (Mass.).

Lima First American Co. v. *Graham*, 6 N. E. (2d) 33, 38 (Ohio).

Roberts v. *Michigan Trust Company*, 262 N. W. 744 (Mich.).

In re Kramer's Estate, 15 N. Y. S. (2d) 700, 707.

Restatement of the Law of Trusts, Art. 170 Q.

Scott on Trusts, Vol. 2, Art. 170.16.

Bogert on Trusts, Vol. 3, p. 1724.

(d) *The City National Bank and Trust Company as Trustee, the Committee and their counsel performed beneficial services for which they are entitled to be compensated.*

(e) *Neither the failure to obtain a chattel mortgage on the furniture nor the subsequent Pick litigation support petitioner's contention that respondents should be denied fees and expenses.*

(f) *Since the complaint made by the petition for certiorari goes to the action of the Court of Appeals in making any allowances and not to its right to increase allowances, the latter question is not presented.*

Dickinson Industrial Site v. *Cowan*, 309 U. S. 382, 60 S. Ct. 595.

Connecticut Ry. & Lighting Co. v. *Palmer*, 305 U. S. 493, 59 S. Ct. 316.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849.

II.

THE UNITED STATES CIRCUIT COURT OF APPEALS DID NOT REVERSE ANY OF THE FINDINGS OF THE TRIAL COURT WHICH WERE NOT CONTESTED.

See Appendix "A".

III.

THE UNITED STATES CIRCUIT COURT OF APPEALS CAREFULLY ANALYZED THE EVIDENCE AND PROPERLY APPLIED RULE 52 OF THE RULES OF CIVIL PROCEDURE.

Morley Const. Co. v. *Maryland Casualty Co.*, 57 S. Ct. 325, 328.

Star Farm Mut. Automobile Ins. Co. v. *Bonacci*, 111 Fed. (2d) 412 (C. C. A. 8).

American Central Ins. Co. v. *Harmon Knitting Mills*, 39 Fed. (2d) 21 (C. C. A. 7).

In re Prima Co., 98 Fed. (2d) 952 (C. C. A. 7).

Guilford Const. Co. v. *Biggs*, 102 Fed. (2d) 46, 47 (C. C. A. 4).

IV.

THE UNITED STATES CIRCUIT COURT OF APPEALS DID NOT ERR IN DENYING THE COURT TRUSTEE'S MOTION TO DISMISS APPEALS 7060 AND 6986.

V.

THE UNITED STATES CIRCUIT COURT OF APPEALS DID NOT RULE THAT THE DISTRICT COURT WAS WITHOUT POWER TO REVIEW, READJUST AND DISALLOW FEES ALLOWED BY DECREE OF THE STATE COURT.

ARGUMENT.

I.

RESPONDENTS FAITHFULLY DISCHARGED THEIR DUTIES AS FIDUCIARIES AND PERFORMED BENEFICIAL SERVICES FOR WHICH THEY ARE ENTITLED TO BE COMPENSATED.

(a) *Petitioner should not be heard upon points not raised below.*

As we have shown in the Statement of Facts, the alleged breaches of trust of the Trustee, the Committee, and their attorneys now relied upon by petitioner to deny respondents' compensation were not raised by the Court Trustee's written answer and objections to the claim of City National for fees for itself and counsel, nor by any other pleading filed by the Court Trustee.

Furthermore, with the exception of the testimony of Mr. O'Brien which was taken before the Master, the evidence and testimony on which the petitioner now relies to defeat respondents' right to fees was not taken before the Master to whom applications for allowances were referred but was adduced before the judge at the hearings on the Trustee's counterclaim and his objections to the report and account of the Indenture Trustee where the question of fee allowances was not in issue.

Moreover, the District Judge clearly indicated in his considered opinion delivered from the bench that he was not disallowing fees to respondents for reasons now mainly relied on by petitioner and that he did not understand petitioner's contentions as to why fees should be disallowed to be those now advanced. (R. 761.) Furthermore, that opinion clearly shows that the Judge did not in fact wholly believe those parts of the findings which the Court Trustee

now advances as the main support of his contentions* although the Court entered them in the form in which they were presented.

Nor were the contentions now made here, urged or argued by the petitioner in his brief in the United States Circuit Court of Appeals. It is true that petitioner in that brief made claim of conspiracy hereinafter discussed under our Point II, but he did so to support his contention made in the District Court that the account of City National Bank and Trust Company should be surcharged and never claimed either in his pleadings below (R. 127) or in his brief in the Court of Appeals that compensation to respondents should be denied on that ground. The fact is that petitioner, in his brief in the Court of Appeals argued that the order appointing City National Bank as Successor Trustee was invalid, that it was thus a trustee *de son tort* and as such entitled to no compensation in any event; that even if it had been validly appointed Successor Trustee, nevertheless it was not to be allowed any compensation because it had been guilty of acts of mismanagement in the operation of the physical property during the period of its trusteeship, and, to the extent that its predecessor in trust Central Republic Trust Company was guilty of the same acts of mismanagement, and City National Bank and Trust Company had failed to compel it to account therefor, but had per-

* Briefly, the Court's conclusions were: that the Committee was organized to bring business into the City National Bank and Trust Company; that the real concern of the bank and the Committee was to stay in possession to collect management fees as long as possible and not with getting the property out of court; the bank as Trustee in possession had mismanaged in that (1) it made no effort to convert excess public space to commercial use, so as to produce additional revenues; (2) as Trustee in possession of both the Granada and the Arlington it had the burden to show that the amount charged for heat, refrigeration, and water was warranted, but that it had not met that burden; and (3) that moneys ostensibly paid to Pick for equipment were in fact paid to procure a release of obligations of third persons on the suggestion of damages in injunction proceedings in the United States District Court—obligations for which neither the bondholders nor the debtor were liable.

For these reasons and none other the court held that there would be no allowances to respondents and directed the Court Trustee to prepare and to present findings "consistent" with what it had stated.

mitted its accounting to be approved, City National Bank and Trust Company was liable to surcharge for the items which otherwise would have been payable by its predecessor in trust. These were the only reasons advanced in the Court of Appeals why the fees of respondents should be denied.*

Since these were all of the reasons advanced by petitioner in the lower courts there is, of course, no justification for the representation which he makes in his petition for certiorari and at page 11 of his brief, to the effect that the additional grounds which he there raises for disallowance of fees were raised in the Circuit Court of Appeals, and that it failed to express any moral or legal concern in regard thereto.

We shall, of course, meet petitioner's present contentions on the merits. Account must be taken, however, of the fact that the evidence adduced both by petitioner and respondents, referred to and quoted by petitioner, was not adduced with the present contentions in mind. As a result, some of the testimony, material to the points now raised, was given only incidentally and is incomplete, ambiguous and uncertain as to time and place when considered in relation to the contentions now made. At times this is so to a degree, which would make it appear that respondents had failed to make the facts known fully and accurately, which they would have been expected to do if the points were then involved.

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* Petitioner under Point VIII of his brief in the Court of Appeals argued that the District Court had properly denied all compensation and said at p. 66:

"It is plainly evident that (1) the failure to pay taxes, (2) the misappropriation and wrongful payments of rents, (3) allowing liens superior to the mortgage to accrue, (4) the charging against the estate of unearned fees, (5) the waste and neglect of the incinerator, (6) the wrongful and unjustified payment of legal fees and court costs, (7) the failure to collect moneys in the form of rents and *service fees due the estate*, all constituted waste to the extent that these acts wasted or depleted the estate. Each and all made the redemption more costly, the payment of the bonded indebtedness more impossible and generally 'lessened the value of the inheritance.' Certainly all of these acts were as injurious to the estate as the most systematic scuttling of the physical assets would be."

(b) *The fact that the committee was formed at the instance of the bank and serviced by its reorganization division, and that two of the members had been connected with Cody Trust Company and two others were officers of the bank would not deprive the committee or the bank of the right to the allowances requested.*

The Trustee makes a great point of the fact that the City National Bank took the initiative in the formation of the committee and that it was composed of bank officers and representatives of the Cody Trust Company. He implies that the disclosure of this fact alone is enough in itself to deprive the Trustee and its attorneys of all fees.

In our statement of facts, we showed that the committee was sponsored and formed by the Trustee and that the bank furnished the committee with personnel and facilities incident to the conduct of its business.

During 1933 in Illinois, as elsewhere, there was no market for the sale of properties for cash. 77B had not been enacted. Foreclosure and sale was the only remedy available. While the Trustee had the exclusive right of action on behalf of the bondholders in proceedings for foreclosure, it was without right or power under the terms of the Granada Indenture to bid in for the bondholders. The law of Illinois provides for a period of fifteen months during which redemption may be made from any foreclosure sale. Accordingly, if the property was to be brought to sale and sold without sacrifice, it was necessary that there be a committee able to formulate and adopt a plan of reorganization under which the property might be acquired at the foreclosure sale.

As we have noted, City National Bank and Trust Company had taken over the deposit liabilities of Central Republic Trust Company. The record does not show it but it may be assumed that many of the people who purchased

these bonds were depositors of the bank. The question was what to do. The bondholders were scattered and their holdings small in amount. They never would have formed a committee on their own initiative. Furthermore, it was at best doubtful if any satisfactory arrangement could have been made outside the bank for the financing of any committee. Should the bank have refused to have anything to do with it and leave the unorganized investors without any protection? Should it not have organized a committee to protect their interests at any sale, and should it not in the interim have seen that the income was in some way sequestered for their benefit? There, of course, was only one decision. In short, the best and most practicable method available was adopted. And it is true, as petitioner claims, that from the time of the organization of the committee, its most active members were Mr. Sturm and Mr. Tuttle, who had had nothing to do with the underwriting, and that the secretarial service was furnished by the bank where all of the details were handled.

We submit that there was, therefore, nothing inherently wrong in the method that was pursued and that the bank is not to be deprived of its right to be reimbursed for the use of its facilities and personnel merely because of its relationship to the committee.

(c) *The sale by City National Bank and Trust Company, as Trustee of the Granada Hotel, of heat, water, and refrigeration to itself as Trustee of the Arlington Hotel at a price fair to both trusts did not constitute a breach of trust.*

Petitioner at many places in his brief and particularly at pages 33 and 44 makes the point that if the Granada, Arlington, and Lincoln Park Manor properties were not to be operated as a single unit or reorganized as a group, it was highly improper for City National Bank and Trust

Company, the Committees, or counsel to continue to represent more than one of them.

But, as we have shown, the three properties had ceased to be owned or controlled by the same persons some time prior to the formation of the Granada Committee and the appointment of City National Bank and Trust Company as Trustee. The first mortgage bond issues were held by different groups of bondholders and were secured by separate trust deeds. The owners of the Arlington and Lincoln Park Manor were free to discontinue taking service at any time. The properties were therefore not being operated as a single unit as petitioner assumes. Nor was there anything in committee representation or reorganization to alter or change these rights.

Accordingly there was no duty to reorganize the three properties as a group.

Furthermore we have heretofore shown that the committees, the Trustee and their attorneys made every effort to effect a group reorganization but that it was impossible to do so.

He also charges that City National Bank and Trust Company in December of 1933 reduced the charge made by the Granada for heat, water, and refrigeration furnished to the Arlington from $900 a month to $600 a month and that in so doing it bargained with itself.

We have shown in the Statement of the Case the circumstances under which the rate of $600 a month was established, and we have shown that at that time City National Bank and Trust Company was not Trustee in possession of either property but that it did participate in the discussions and did assure itself that the amount charged was fair. Shortly thereafter an agreement was executed by the two owner corporations to give effect to the arrangement so made. Had the Bank at that time been in possession of

the properties, it would have been unnecessary to consult the officers of the corporation.

The arrangement so made was continued in effect down to January of 1935, when City National Bank and Trust Company of Chicago became Trustee in possession of both properties. It continued to charge at the rate of $600 a month. It owned none of the indebtedness of the corporations which owned those two hotels. It had no personal interest of any kind. The bonds were held by the public (R. 67, 181, 513).

The authorities which we have cited under this point sustain the proposition that the action of the Bank did not constitute a breach of trust under these circumstances, if the price fixed was fair.

The cases cited by petitioner to the contrary, namely, *Metcalf v. Metcalf,* 286 Ill. App. 10, *Lerk* v. *McCabe,* 349 Ill. 348, and *Chicago Title and Trust Co.* v. *Schwartz,* 339 Ill. 184, are all agency cases and are not applicable.

It is true that the law forbids an agent to represent both buyer and seller without disclosure and that the agent in such a transaction is not entitled to any fees or compensation, and that the transaction is voidable.

All of the cases cited by petitioner in Note 21, at page 25 of his brief, are cases that support this proposition.

However, it is permissible for a trustee in one trust to sell to itself as trustee in another trust, provided the price is fair. Such a transaction is not voidable and is not a ground for denial of fees to the trustee.

That these two principles are not inconsistent is illustrated by the fact that the Restatement of the Law, which is intended to be a co-related statement of the law on all subjects, states the law in reference to an agent representing both buyer and seller and a trustee of one trust selling to himself as trustee of another trust to be as above

stated. See Law of Agency, Art. 313(2); Law of Trusts, Art. 170-Q.

Likewise, in Footnote 13, at page 24 of petitioner's brief, he cites *Bogert* on "The Law of Trusts and Trustees" to sustain his proposition. But it is interesting to note that in Volume 3, at page 1724, Mr. Bogert states "A sale by T, as Trustee of the A estate, to T, as Trustee of the B estate, has been sanctioned where made in good faith."

Indeed the trial court took this view of the law when it said that under those circumstances the burden was on the Trustee to show that the amount charged was reasonable (R. 767).

Now as to the reasonableness of the rate—the Arlington stood fully equipped with refrigerator boxes and all necessary pipe lines and with its own radiators and steam pipe, and hot and cold water lines. The witness Brooks, an engineer called by the City National, rendered a written report (R. 504), which showed that the Arlington could have put in its own heating system, water supply system, and brine refrigerating system, and furnished its own service for about $5,500 a year, including fixed charges of 15% annually made up of interest on the investment, depreciation, insurance and taxes.

Or, if the Arlington were to install its own heating plant and its own individual electric refrigerators (which it did do), it could have furnished its own heat, hot water and refrigeration for $7,041.51 a year—and have much more attractive and efficient refrigerating units. That figure is made up in this way: The Court Trustee's own witness, Schott, one of the engineers who made a survey of the property, said that a reasonable charge to be made by the Granada for all services, *including a 20% profit*, would be $812.59 per month or $9,751.08 a year (R. 322). He then said that if the Arlington should discontinue the refrigeration service it would be entitled to a credit of $333.18 per month or $3,998.29 per year (R. 286). This would leave

$5,752.79 as the annual charge on the basis of his own figures for heat, hot and cold water. Schott's own testimony is that 76 General Electric individual 3 to 4 feet boxes could be purchased by the Arlington for $7,600. The witness Mackie, a research analyst and expert on operating costs of individual electric units, testified that the cost of electric current is 50¢ per box per month and the maintenance charge is $1.22 per box per year (R. 397). His testimony is undisputed.

So taking the investment at $7,600 and allowing 15%, or $1,140 per year, to include interest, depreciation, insurance and taxes, and adding the operating charge of 50¢ per box per month, or $456 per year, and the maintenance charge of $1.22 per unit or $92.76 per year, gives annual operating and fixed charges of $1,288.72, which, added to Schott's suggested charge of $5,752.79 for heat and hot and cold water, gives a total of $7,041.51 a year—an amount well within the $7,200 that the Arlington was actually paying.

The point of the matter is, that in no sense would it have been reasonable or just to require the Arlington to pay more than what it would have cost it to furnish its own heat, refrigeration, hot and cold water.

And again City National retained an outside engineer, the witness Dauber, who rendered a detailed report and survey which showed the total cost to the Granada for servicing the Arlington with heat, refrigeration, hot and cold water, to be $6,933.96, including all operating and fixed charges. Adding 10% for profit gives a charge of $635.30 per month (R. 627-631).

We thus have two engineers starting at the same operating cost, one recommending a charge of $812 a month and the other $635 a month a difference of $2,125 a year, and here is how it happened.

1. Schott charged $416.80 a year too much profit, even on the basis of 20%, for his report shows that he took the

operating charges, added in 15% for the fixed charges, and computed 20% profit on the whole thing instead of taking 20% profit on the operating charges.

2. His report shows (R. 532) that he figured 5.7% on $44,410, the original investment, for "maintenance and supplies." There is no basis for this charge since the actual maintenance and supply figures were already taken into consideration in his detailed statement. This error makes for a difference of $836 per year on the Arlington alone.

3. There is a difference of $192 per year on account of excess depreciation of 1.3% based on the investment of $44,410. That is to say, Schott takes 4.3% a year for depreciation, writing off the plant in 15 years. He said this was "customary" but admitted that the life of the plant was at least 22 years. On a 22 year life the proper depreciation would be 3% a year, as taken by Dauber.

4. There is an item of $613 a year in favor of the Arlington on account of 10% excess profit. Schott figured a 20% profit, Dauber 10%. Dauber said 10% was fair, and Schott's opinion differed, although Schott had to justify the 20% on what he called "the hazard of maintaining service," which hazard lay "in the necessity that the Granada take care of its central plant,"—which it seems quite plain it would have had to do whether it was servicing its own property alone or its own property and others.

These four items alone total $2,057.80. Adjusting Schott's figures on account of these errors leaves a difference in the two reports of $100 per year more on Schott's than on Dauber's.

Both engineers made a common error. They each depreciated the plant at so much per year without inquiring to see at what rate it had been depreciated in the past, and they admitted this.

The fact is that from 1929 down to January of 1934 the

Granada had been making a charge sufficient to include operating costs, 15% for interest and amortization, taxes and insurance, and an additional 20% for profit (R. 649, 652, 653, 655). The result was that the Granada had long since written off its original investment, after which no further depreciation is allowable (R. 448).

The Granada's own books show the total operating charges to be $19,633 for the three properties (R. 656). Deduct 50% for the Granada's share, balance equals

Operating cost of Arlington and Manor	$ 9,333.00
Add 10% operating profit	933.00
Add half of interest at 5% on $44,400 investment (the share of the Arlington and Manor)	1,100.00
Add the Arlington and Manor's share of amortization at 3% on the original investment	660.00
Total fair charge to Arlington and Manor	$12,026.00

But against this the Granada actually received $13,810.02 from the Arlington and Manor (R. 655).

Put in another way, it cost the Granada for total operating expenses on the three properties, before fixed charges and profit $19,633.45

Add interest at 5% on its investment of $44,400	$ 2,200.00
Add depreciation at 3% on 22 year life	1,320.00
Total of fixed and operating charges before profit	$23,153.45
Deduct amount received from Arlington and Manor	13,810.02
Leaves a balance of	$ 9,343.43

representing the cost to the Granada not only of its own heat, refrigeration, hot and cold water, *but also for its own house lighting.* On the basis of Schott's report the Granada heat, refrigeration, hot and cold water for its own

use should cost $15,940.93 (R. 533). Deduct the actual cost of $9,343.43 leaves a profit of $6,597.50.

We submit that these figures conclusively show not only that the Granada was getting an exceedingly fair charge from the Arlington but was operated at a very handsome profit, realized to a great extent on an antiquated brine refrigeration system.

We further submit, on the basis of the record, that it cannot be said that the Trustee failed to give meticulously close consideration, study, and attention to the problem as to what a fair charge should be, and when it charged, as City National did from January 4, 1935, the sum of $600 per month, the above figures show that the results of its study were exceedingly accurate.

(d) *City National Bank and Trust Company, as Trustee, the Committee, and their counsel performed beneficial services for which they are entitled to be compensated.*

The petitioner at pages 25 to 56 of his brief seeks to establish the failure of the Committee, the Trustee, and their counsel to perform their duties as fiduciary. In an effort to accomplish this he refers to or quotes testimony of Bank witnesses, most of whom were called by him and cross-examined by permission of the trial court (R. 172). The meaning of the witness is misrepresented in instance after instance by extracting some short sentence of the testimony from its context and assigning some meaning thereto not warranted by the context, and sometimes by coupling statements extracted from different parts of the record and actually having no relation to each other. It seems impossible to meet such a situation without burdening the court with extended reference to and quotation from the testimony of the witnesses. This we have hesitated to do. However, we deem the misrepresentations of such a serious character and their bearing on the issues involved of

enough importance to warrant our imposing on the court a tedious task which it should not have had to undertake.

On page 26, in reference to Mr. Sturm's testimony, are the following representations:

1. Petitioner says that Sturm admitted that "his status was difficult to explain" and said that the Committee "did not concern itself very much with the operation of the Granada."

Sturm actually said he had nothing to do with renting, repairs or physical condition of the hotel or its operation; that his duties with City National with reference to the property are perhaps a little difficult to explain. They had to do with the bond issue, the defaults, finding a fair means of reorganizing (R. 202). The committees are always interested in knowing something about the operation of the property, although it does not concern itself very much with the operation. They want to know that someone is in there operating and that the property is being used for proper purposes (R. 203).

2. That "the Committee co-operated with the Trustee" in taking the bondholders' money to pay for the *Tuttle* v. *Harris* litigation.

Sturm said that the Committee and the Trustee co-operated in *carrying on the litigation* because it did not feel that it could wind up with a valid merchantable title; that it was proper to take the bondholders' money to pay for this litigation (R. 206).

3. That "the Bank furnished the Committee" and then "became the depositary", and "if there are any fees allowed the Committee they go to the Bank."

Sturm at this point was not talking about the Granada Committee. He was talking about the Bank committees generally, and he said that the Bank furnished the committee (meaning the officers who were to serve on the committee) and that it furnished the personnel and facilities to

make it carry on (R. 210). He also said the members of the Granada Committee individually do not ask nor do they receive any fees, directly or indirectly, and that the cost does not include anything for the members of the Committee individually (R. 469).

4. That after City National formed the Committee, the Committee then filed a petition in the state court to have City National appointed as Trustee.

The statement is literally true, but the Committee was organized in April of 1933 and City National was not appointed Trustee until January of 1935.

5. That the Committee did not object to lawyers' fees.

Sturm said that the Trustee's fees, Master's fees, and counsel fees had all been considered by the Committee, not separately in the Granada case, and that the fees recommended by the Bar Association are fair and are allowed by the courts, and that he did not make any objection about such allowance in the state court (R. 220).

And continuing on page 27, the petitioner represents:

6. That Sturm did not know the value of the property nor the tax situation from year to year.

Sturm said (R. 220) perhaps it is worth $200,000 or $250,000, and as to the taxes that he had not checked whether the taxes are any better now than they were last year.

7. *That Sturm knew the prospectus issued by Cody Trust Company told the bondholders the furniture at the Granada was paid for, but he made no effort to have Cody Trust or its officers pay for it.*

On being shown the prospectus, Sturm said he had nothing to do with this circular but he may have seen a copy of it. Instead of looking at the prospectus I preferred to have our people gather information concerning the property. I was interested in getting the information first hand.

As to his further statements contained at R. 225, for accuracy we refer to the unprinted transcript, page 600, which follows:

> Q. If that circular describes not only the physical property, the real estate, but also describes all the personal property in it and gives its value as $80,000, don't you think the bondholders bought the personal property?
>
> A. That is what they thought they purchased.
>
> Q. Then you do not know that they bought the personal property when they bought the bonds?
>
> A. I know it was represented in this, but I do not know whether they bought it or not.
>
> Q. Well, if they read in there so much personal property and so many beds and the place was well furnished and the personal property is worth $80,000, don't you think they bought it?
>
> A. Well, if they didn't have something to secure that, I don't think—maybe that is what was represented, but they did not get it.

8. That the Committee borrowed the money on a receiver's certificate to buy the furniture and didn't know if the furniture had been paid for twice. Unprinted transcript, page 601 shows:

> Q. Well, he was paying for it the second time, is that true?
>
> A. I don't know about paying for it. We are paying for it for the first time as far as I am concerned.
>
> Q. Well, you were paying for it the first time, but the bondholders had already paid for it, or according to this circular—
>
> A. According to the circular.
>
> Q. Then it was paid for twice?
>
> A. You can draw your own conclusions. I don't know.

As to petitioner's representation that Sturm made no effort to have Cody Trust Company or its officers "pay for it"—meaning the furniture—Sturm did not say that. Sturm said that he did not make any effort to have Cody Trust Company or its officers pay for the *receiver's certificate,* because he did not think it was collectible (R. 225).

9. That when the committee made an important decision only two or three members attended the Committee meeting. Sturm was talking about a specific matter, not general practice, and he said: "We usually have two or three sit in on a matter of this kind because we regard it of sufficient importance" (R. 230).

Concerning the witness, Charles S. Tuttle, whom he had called for cross-examination, petitioner says that he testified that he didn't know there had been a petition filed asking for expenses and fees for the Committee in this proceeding.

The question, as phrased, required that answer, for the Committee never requested fees.

At page 28 of his brief, petitioner, referring to Lewis Riddle, says that Mr. Sturm testified that Cody Trust Company, or some people associated with it, controlled the Granada Corporation stock in 1933.

Sturm said, in addition, it was then reported that the stock went over to Mr. Albers (the Receiver of Cody Trust Company) and then was acquired by a syndicate (R. 220, unprinted transcript 593).

10. That Sturm testified that Mr. Riddle and Mr. Hiram S. Cody were on the indemnity bond together and that funds were taken from the Granada Trust to pay their obligations.

Sturm said, on being shown Exhibit "M", an indemnity agreement, I cannot say whether I have seen this document or not.

At R. 221, Sturm, on being asked by the court if he knew that in paying out money on the receiver's certificate he was bailing out Wenstrand, said "We certainly did not figure that. I didn't know I was protecting him. I thought I was protecting the bondholders when I was doing that, protecting the operation of the property, making it possible

for this property to operate. I certainly had no interest at any time to favor Mr. Wenstrand or aid him in any way."

The Court: You did not know that Mr. Wenstrand was obligated to purchase that—buy that receiver's certificate, if it was not paid off?

The Witness: No, I didn't know that. I don't know that now, if it is a fact.

Sturm was referring to an alleged agreement of Riddle, Wenstrand and Cody to purchase the receiver's certificate from the surety company if it was not paid.

And as to the words "and that funds were taken from the Granada trust to pay off their obligations," Sturm is here referring to Exhibit M, which is the application for the indemnity bond and not an agreement to purchase the receiver's certificate. At unprinted transcript 607 he was asked:

Q. Did you think it was proper to take the funds of this trust and pay off the obligation of those people on that bond in this court?

The Witness: I have lost that.

Mr. Woods: Did you think it was proper, or not?

A. I said I thought it was proper in the light of the whole situation.

And (at R. 230) Sturm said, I don't know whether those gentlemen were released on this indemnity. I don't know just what kind of an order was entered at this moment. If the Indemnity Company was released, I suppose they fell with the release to the Indemnity Company.

11. Petitioner said that O'Brien testified that *"Lewis Riddle had given the Surety Company an Indemnity Agreement, and a receiver's certificate had been issued to pay that claim, and that his firm had been paid $2,000.00 for counsel fees for conducting the litigation."*

O'Brien said, R. 499, "I know *now* that Hiram Cody, Wenstrand and Riddle were indemnitors on the surety bond."

As to petitioner's statement that a receiver's certificate had been issued to pay "that claim," the claim referred to was that of Pick & Company and not a claim on an indemnity agreement, as petitioner implies. The litigation for which $2,000 was paid counsel was the fixture litigation in the state court.

12. And on page 29 petitioner refers to O'Brien's statement about the prospectus. We shall discuss this in relation to a similar statement at page 47.

13. Arnold Johnson testified that the bank's reorganization division made recommendations to the Committee.

Johnson said (R. 422):

> "The reorganization division has varied in size—each man would be assigned a number of loans. It would be his duty to make a careful examination of all the facts as to the property and the default, and he would follow through from a reorganization standpoint and put things in a concrete form and make recommendations as to plan of reorganization.

Petitioner says that by "we" the witness referred to the bondholders' committee and to the reorganization division of the bank.

Johnson said (R. 431):

> "I cannot say the number of meetings held after Kilmer's appointment because many subjects came up for discussion where we would not send out a formal committee meeting or record. We did not just sit around the bank when we felt like it and talk about it. By 'we' I refer to the bondholders committee and the reorganization division. When I say that we considered various things I include in 'we' the individual members of the Committee, myself and others in different departments."

14. Petitioner says Johnson testified that, "We had committees on about 375 of the 400 issues that we handled," that the Committee held only four formal meetings as shown by the Committee's minute book.

Johnson said that the Committee (on the Granada and not on 400 issues as petitioner implies) held only four formal meetings as shown by the minute book but that the Committee held other meetings at which matters were discussed but no formal decision was made (R. 436).

15. Petitioner says that Johnson testified that the officers of the Central Republic employed the attorneys now representing City National and that Committee had nothing to do with hiring its lawyers.

As we have shown in the statement of facts, Johnson was referring to the original retention of counsel in the Thuma-Granada fixture litigation and not to the later retention of counsel in 1933 by the committee.

Johnson also said (R. 437):

> "It was talked over with the Committee members. I don't see how you can draw the conclusion that for all practical purposes the Committee and the bank were one and the same because three of the members are not even with the bank and it is not true for all practical purposes that they are one and the same."

16. Commencing at page 35 of his brief petitioner makes the following representations in respect of the testimony of Mr. Hubbart:

That at the same time he as agent for the Bank was operating the Arlington and the Granada he collected from the Arlington for heat, water and refrigeration $600 a month, and objected when he found the Arlington paid as much as it did.

Hubbart said (R. 177) that during the period that he operated the Granada he collected from the Arlington $600 a month. He had to do with the Arlington since the end of December, 1933, and the Bank was Trustee of the Granada from January of 1935. An investigation was made and as a result a contract was signed reducing the service charge to $600 a month. He said that the amount

was excessive and that it was investigated and an accountant's figure was secured from experts, and that it was not the fact that pressure was put on to force it through.

17. That Hubbart stated that he did not make any effort to get any permanent tenant for the ball room space in the Granada (page 36, petitioner's brief).

This statement is lifted from hundreds of pages of testimony on the subject of lobby revision to increase revenues. The record shows that the zoning ordinances prohibited commercial use (R. 386); that extensive structural changes would have been necessary (R. 368, 381, 383), in short that it would be a costly and unsuccessful enterprise. See testimony of witness Kirkeby (R. 235), Brittain (R. 367), and McDonnell (R. 378).

18. As to the testimony of the witness Bickel, petitioner represents that at the time of the fixing of the service charge at $600 a month Central Republic was Trustee under both mortgages.

Bickel did say this, but added "although not in possession of both."

19. That Chicago Title and Trust Company was not operating the Granada when Central Republic Trust Company took possession as Trustee. They had stated that they would prefer to be at that time. We were operating it through Mr. Hall.

Mr. Bickel said (R. 417):

> "I remember the Title Company saying they wanted to operate the property direct but whether they had done so or not I don't remember. Mr. Hubbart would remember that."

20. At page 38 his brief, petitioner represents that McDonnell testified he would try to make some use of excess lobby space to bring in money.

The testimony, commencing at R. 380, shows that hotel

dining rooms are unprofitable; that it would be costly to convert the lobby space; that as a business location the property does not appeal, and that the manager told him there were restrictions as to street openings, etc.

22. At page 40, as to Hertzman, petitioner said he testified he had written a letter to City National urging a reduction in the amount of the payments made by the Arlington Hotel to the Granada and "I understand that as a result of this letter they made a charge-off in January of 1934 of $4,080."

Hertzman said (R. 304):

> "I was told why this report was desired by Mr. Bickel and Mr. Hubbart. They said they wished the calculation in reference to what the fair costs of heat, refrigeration, and hot and cold water should be and how the charges should be made."

23. At page 41 petitioner says the witness O'Brien testified: "We later appeared in court on the presentation by the receiver of the account of Central Republic Trust Company." He did not indicate whether he appeared as counsel for City National and the Committee or for Central Republic, who received a full and complete discharge and release from all liability.

Central Republic Trust Company which had gone into receivership during 1934 was represented by William L. O'Connell, Receiver, whose attorneys were Igoe & Flaherty, who appeared and tendered the account to the court for approval (R. 621). O'Brien appeared for the Successor Trustee, City National Bank and Trust Company, which was familiar with the account (R. 196). Later City National filed full account in these proceedings (R. 111).

24. O'Brien testified that for defeating the federal bankruptcy court's jurisdiction we were paid by City National Bank and Trust Company the sum of $3,500.

The testimony was that the litigation in *Thuma* v. *Gra-*

nada had been in the United States District Court, the Circuit Court of Appeals, and in the Supreme Court, and that "for the services thus necessarily rendered in the whole bankruptcy proceedings were paid by City National Bank and Trust Company the sum of $3,500, on April 13, 1936 * * *" (R. 483, 484.)

25. O'Brien, speaking of the foreclosure in the state court said there is no question but what he spent 6½ years, from June, 1930 to December, 1936.

Since the cross-complaint to foreclose was not filed until August of 1933 the statement is obviously incorrect. It is true that the Thuma fixture litigation was filed in June of 1930.

Page 43—Item (9) does not purport to be a finding of fact, although it was included in the findings which the Court Trustee prepared and had entered. Assignment of error has been made to every material finding on which that finding possibly could be based.

26. Petitioner says, yet the bondholders and its Committee and the new Trustee were there represented by the lawyers of the accounting fiduciary, who received its discharge.

As above noted, Igoe & Flaherty were counsel for Mr. O'Connell as Receiver of Central Republic Trust Company. Nor were respondent attorneys counsel for Central Republic Trust Company individually at any time. They were counsel for Central Republic Trust Company as Trustee under the Granada trust deed. The account was presented in 1935.

27. Petitioner says Chicago Trust Company with Cody Trust Company were the underwriters of the two Granada bond issues; it was the Chicago Trust Company, this firm's client, who had issued a fraudulent prospectus which stated that the Granada furniture was additional security for

the bondholders when, as a matter of fact and truth, the furniture was not owned by Granada but had been obtained on a chattel mortgage. Mr. O'Brien testified to this for he said "I think both the Chicago Trust Company and Cody Trust Company advertised in their circulars this furniture was part of the security sold to bondholders."

If, by the words "this firm's client" petitioner means to imply that attorney respondents had anything to do with the preparation or issuance of the circular we state that they did not and also they knew nothing about it, nor does the testimony show that Chicago Trust Company was its client in this transaction.

For accuracy we quote from the unprinted transcript (p. 1031):

"Q. You didn't prepare the trust deed, did you?
A. We prepared whatever forms of trust deed were in use by the Chicago Trust Company.
Q. You did?
A. Any printed forms we prepared, yes.
Q. Do you mean to say that they themselves drew up the trust agreement and filed it and asked you for an opinion?
A. Yes, they had their own title division which included lawyers dealing with recording papers and disbursing of loans.
(p. 1032)
Q. Do you know who attended to the release of the old trust deed in 1928?
A. No.
Q. Did you know the Cody Trust Company and others agreed to pay off the Pick claim at the time the new financing was done in 1928?
A. No.
(p. 1036)
Q. That was an agreement as between the Cody Trust Company and the Chicago Trust that the Cody Trust should carry out that obligation?
A. The agreement was that the Cody Trust was to see that the bondholders ended up with a good first mortgage on the property and they pledged $50,000 of Seconds to insure that.

Q. In other words, both the Chicago Trust and the Cody Trust advertised in their circulars this furniture was part of the security sold to the bondholders?

A. I think so, I think they did.

Q. And they agreed with Granada they would remove that lien out of the proceeds of the loan, to clear title, which they did not do?

A. No. They had no such agreement with Granada. The Granada had that condition in the loan agreement, they would do it.

Q. Well, if the Cody Trust,—just assuming what I say—if the Cody Trust Company agreed, the Cody Trust or the Chicago Trust agreed to clear the lien out of the proceeds of the loan, what justification is there anywhere along the line since then to take bondholders' money and use it to pay off that lien?

A. Well I do not say there was not an existing cause of action against perhaps the Cody Trust and the Chicago Trust Company. I put a period there."

From the question as presented it is easy to understand the answer "I do not say that there was not an existing cause of action"; for the question required that O'Brien assume facts to be as stated in the question. Similarly in the case of petitioner's statement that O'Brien knew that $120,000 worth of furniture that Granada was obligated to pay for had almost wholly disappeared and could not be found.

Reference to the unprinted transcript at page 1032 shows:

"Q. If I told you those financial records showed charges by Pick & Company against the Granada, the old company and the new company, amounting to $120,000 would you be surprised?

A. No.

Q. Now, in the handling of these matters relating to the furniture, did it ever occur to you that $120,000 worth of furniture must have been distributed among other places than the Granada itself?

A. Well, I never considered the question from that standpoint.

Q. You never considered whether some other hotel might have been charged with it?

A. The only furniture I ever had occasion to consider was the new furniture purchased for $35,000.

(p. 1033)

Q. You handled that transaction?

A. No, except on the assumption of the balance due on the conditional sales contract amounting to about $19,400.

(p. 1936)

Q. Did you know the Cody Trust Company and others agreed to pay off the Pick claim at the time the new financing was done in 1928?

A. No.

Q. You did not know that?

A. Not at that time."

These references to the unprinted transcript in question and answer form make it more plain that there is no justification for the conclusions urged by petitioner and they will support the argument hereinafter made under Point I (e).

As to O'Brien's admission that his firm spent seventy-eight months in the state court foreclosure proceeding and the petitioner's contention that the purpose of the delay was to allow the statute of limitations to run for the protection of "the former unfaithful Granada fiduciaries who were clients of his firm," we call attention to these facts:

(1) The proceedings filed in June of 1930 were not for the foreclosure of the first mortgage, but, until August of 1933, when a cross-bill was filed to foreclose the first mortgage, the proceedings related chiefly to the fixture litigation.

(2) In no way could the pendency of those proceedings have misled or lulled into inaction any bondholder who might have had a right of action for misrepresentation, if any. Patently, the proceedings would have just the opposite effect.

(3) Since the Illinois statute of limitations is five years and since the issue in question was made in September of

1928, there was not more than a month or two subsequent to the time of the filing of the cross-bill within which suit might have been brought on account of the circular misrepresentation, if any.' Surely, therefore, the delay from September of 1933 on could not have had the purpose indicated by petitioner.

Petitioner had included a provision in one of his findings submitted to the trial court that the purpose of the delay was to allow the statute of limitations to run. The trial court refused to so find (R. 732, 733), and the provision was eliminated.

Petitioner further states that Wenstrand and others were indemnitors on certain surety bonds and that O'Brien admitted it. He refers to R. 499, at which appears part of the testimony taken before the Special Master after the conclusion of the trial before the court.

O'Brien did not admit any such thing. His statement was:

> "I do not know that Cody Trust Company and others agreed to pay off the Pick claim at the time the new financing was done in 1928. I did not know that at any time. I know now that Hiram Cody, Wenstrand and Riddle were indemnitors on the surety bonds."

It is plain that the witness was speaking of knowledge which he had at the time he was testifying, gained from information obtained at the trial.

Petitioner says at page 48 of his brief that City National and its Bondholders' Committee paid off Wenstrand's debt out of the bondholders' money, and that no one asked Wenstrand to pay his own obligations.

We have already related Mr. Sturm's testimony showing that he did not know even at the time of trial that Wenstrand was obligated in any way to buy the Receiver's certificate if it was not paid (R. 221). Nor did he believe that he was discharging any obligation of Wenstrand (R. 228). Sturm further said that he was familiar with Wenstrand's

affairs in the sense that he believed him to be wholly unable to meet obligations (R. 229). This contention by Petitioner is the same as the one he argued in the District Court when he said that the equipment items were purchased from Pick for more than their value, the amount paid in excess of the value being used to procure a release of a suggestion of damages. We shall discuss that contention under our Point I (e).

The suggestion made by Petitioner at the bottom of page 49 of his brief that it would seem from O'Brien's testimony that his firm also represented the interests of the Cody Trust Company and Petitioner's further statement that there can be no doubt but that Defrees, Buckingham, Jones & Hoffman were the attorneys engaged to establish the invalidity of the Pick chattel mortgage are both covered to some extent in our statement of the case. When Petitioner goes on to suggest that this is so because of the hours of service which the attorney-respondents have charged to the Pick furniture litigation in the state court, it is difficult to believe that his suggestion is made in good faith. The representation made by Cody to Keith was that the Pick chattel was invalid. Now if its invalidity had been established Pick never would have been able to take out the loose furniture as it was permitted to do promptly upon intervention in the state court proceedings. The lawyers whom Cody had in mind had unsuccessfully contested it in the federal court. We did not contest the validity of the Pick chattel, although we were in no way barred from doing so by reason of the federal court decree, inasmuch as the Trustee was not a party to the federal court proceedings.

There being a complete lack of any record evidence to show that attorney-respondents ever represented Cody Trust Company, Petitioner has gone to unusual lengths to establish off the record that attorney-respondents did represent Cody Trust Company. For example at page 44 of his petition for the writ of certiorari he sets out a portion

of a letter which he wrote to the United States Circuit Court of Appeals in which he said:

> "Since this Granada case was argued there appears in the advance sheets, *People* v. *Cody Trust Company*, 301 Ill. App. 580, wherein said law firm, meaning Defrees, Buckingham, Jones & Hoffman, is reported as representing the Cody Trust Company."

Mere reference to the official report of that case will disclose that those attorneys whom Petitioner referred to in said letter appeared for State Mutual Life Assurance Company and for nobody else. Equally untrue is Petitioner's conclusion at the top of page 50 of his brief, "Thus we see that the law firm represented the party owning and controlling Granada's common stock", meaning Cody Trust Company, and then Petitioner makes a point of the fact that the memorandum fixing the charge for services to the Arlington at $600 a month was prepared by O'Brien as testified to by Hall in the District Court, and Petitioner says that O'Brien, although present, did not deny it. The fact is, although the narrative (R. 402) did not disclose it, that O'Brien, who was examining Hall on direct, asked Hall if it was not a fact that he, O'Brien, had prepared that document, and Hall said that O'Brien had done so at Hall's suggestion, he thought (Unprinted transcript, 870).

At page 51 of his brief at finding 3, it is stated, "The records show that the attorneys whom they (meaning City National Bank and Trust Company) now retain, Defrees, Buckingham, Jones & Hoffman, have been active in all these matters since 1924 and have had to do with most of these litigations." It is indeed strange that the trial court made no finding of knowledge by the attorney-respondents of the serious matters charged against them by the Petitioner, and surely the words "have been active in all these matters" are not to be taken as a finding of such knowledge, especially when it is considered that the court Trustee who prepared these findings and had ample time within which to make sure that they unequivocally

stated the points which he had in mind and in this connection it is equally true that City National Bank and Trust Company of Chicago, as Trustee, was without knowledge of these matters. That this is so is perhaps best proved by reference to paragraph 35 at page 25 of the petition for certiorari. There the Petitioner, notwithstanding his findings, is so hard put to find evidence of knowledge on the part of City National Bank and Trust Company that he argues to this court that the supposed knowledge of the attorneys gained from prior dealings is to be imputed to the bank on the principle that knowledge of the agent is knowledge of the principal.

And consider Finding 6 at page 52 in relation to the colloquy between counsel and the trial judge at R. 223.

As to Finding 8 at page 53, there was no need to assign error, for the portion there stated is merely a proposition of law. We did assign error to the main part of the Finding, which is the part relating to the facts (R. 827).

At the top of page 89 of his brief petitioner asks respondents to show by what authority City National Bank and Trust Companyof Chicago acted as depositary and by what authority it claims fees. We too have been unable to find in the printed transcript any agreement or court order substituting City National Bank for Central Republic Trust Company. We have noted, however, that Exhibit A to the Committee's petition for allowances (R. 164) indicates that the Committee disbursed $50 for legal services incident to procuring the resignation of Central Republic Trust Company as depositary and the appointment of City National Bank and Trust Company of Chicago as successor depositary.

Petitioner sets this out at page 20 of his petition for certiorari.

In Finding 2 at the top of page 55 there is the following statement:

"Chicago Trust Company and the Codys and their

> attorneys failed in their promises to the bondholders in 1924 and 1928 * * * to tie in the furniture and equipment of the Granada Hotel as part of the security."

All of the language of this Finding 2 is taken from Finding 37 (R. 782). Respondents assign error to entire Finding 37 (R. 823). The record references given by petitioner to support this statement against attorney respondents are 497 and 499. We have read and reread the record at those points and we see no evidence to sustain the statement, if by the words "Codys and their attorneys" is meant attorney respondents. The statement finds some support if the attorneys referred to are those mentioned at R. 499 (Goldberg and Goldberg), who were the lawyers who had advised Hiram Cody that they could establish the invalidity of the Pick chattel mortgage.

It is to be noted also with what pains the finding is stated, so as to give a double meaning. One way you read the statement is that the attorneys were counsel for both Cody Trust and Chicago Trust, but that isn't what is stated. It says "Chicago Trust and the Codys and their attorneys." But there aren't any Codys, only Hiram Cody and Cody Trust Company, a corporation. Surely, if the petitioner had meant Defrees, Buckingham, Jones & Hoffman, it would have been easy for him to have said so.

Finally, there are the supposed admissions of record by respondents' pleadings mentioned at Appendix E of petitioner's brief. Of those mentioned at page 103 we deny the statements as made at 1, 2, 3, 7, and 8. We admit the statements made at 4 and 6, and admit the statement at number 5, but only as to the tax certificate. Of those enumerated at page 104 we admit 1, 2, and 3, except that only two of the Committee members were in the employ of City National. We admit 5 and 7, and deny number 8. As to numbers 4 and 6, we can neither admit nor deny, for they must be read in relation to the context.

Is It a Fact That Respondents Were Interested in Keeping the Property in Court?

Petitioner has had much to say about years of litigation, and he claimed and the trial court found that the real concern of the Bank and Committee was to stay in possession to collect management fees and not with getting the property out of court. We believe that the Statement of the Facts which has been made adequately discloses the complexities and difficulties which the Committee encountered. As far as the Indenture Trustee was concerned, there was no point in bringing the proceedings on to a foreclosure sale unless and until the plan of reorganization was available.

It remains to be said that City National Bank and Trust Company had full responsibility for the management of the property during the period of its possession. Its compensation was 4% of the gross income. Its pay for two years of operation was $8,853.19, not much more than the fees of $7,500 paid to the Court Trustee for six months' operation (R. 962). From 1933 to 1937 it was maintaining a reorganization division. It was to be compensated for use of facilities and personnel at a fixed rate of about 2% of the amount of the issue (R. 469), and it did not increase from year to year while the case stayed in court. Had it been able to effect a reorganization it would have received its fees as Indenture Trustee and as depositary and reimbursement for the facilities and personnel furnished the Committee. The lawyers too would have been paid.

In this situation it is difficult to conceive how the Bank, motivated by any self-interest, would unnecessarily defer disposition of the case. There are many issues handled by the Bank committees—about 400—and of those, as of 1937, it had completed the reorganization of 275, with 80 more in process of completion. Indeed plans had been submitted on all but about 75 (R. 434). Not only that,

but the Bank was Indenture Trustee under many trust deeds securing issues of bonds underwritten or sold by Greenebaum Sons Investment Company. Those issues were secured by some of the largest properties in Chicago. The Bank refused to take possession of those properties and it never changed its policy. It was only in the case of the Central Trust Company of Illinois and Chicago Trust Company issues that it was willing, for reasons assigned in the Statement of Facts, to take the responsibility of possession (R. 432, 433).

We have shown that when the property came in to the federal court in the present proceedings a speedy reorganization was effected. It is true that at the time of the approval of the petitions the Bank considered that the reorganization was sufficiently doubtful so that it would be better to retain possession until a plan was confirmed. It had not objected to the approval of the petitions, however, and, when Judge Barnes said that he would vacate the orders of approval if the Bank maintained its position, possession was surrendered.

(e) *Neither the failure to obtain a chattel mortgage on the furniture nor the subsequent Pick litigation support petitioner's contention that respondent should be denied fees and expenses.*

It is the failure of respondents in their alleged duty to tie in the furniture as a part of the trust estate in accordance with the circular representation, and the subsequent Pick litigation—allegedly prosecuted to avoid liability on the circular—that constituted the "conspiracy" charged in petitioner's pleadings, found to exist by finding 26 (prepared by the court trustee), mentioned by the Circuit Court of Appeals in their opinion, disavowed by the petition for certiorari, and now urged again on the court in more or less veiled form (see Assignment of Errors (i), Petitioner's

brief page 14, and pages 27, 32, 47, 48 and 54). It is what petitioner once called "the heart of the whole case" before he ostensibly repudiated his contention.

Assuming that there was misrepresentation in the circular, it must be borne in mind that there was nothing in the *trust indenture* which purported to create any lien on the furniture or to make it any part of the trust estate. Nor does it appear that in the loan agreement the borrowing corporation undertook to give a first lien on the chattels (R. 505). The petitioner's implication that the new first trust deed required that the furniture be tied to the real estate by *a first lien chattel mortgage* is not borne out by the facts, as a mere inspection of the indenture will demonstrate (R. 505).

Equally untrue and absolutely unsupported by the record is petitioner's implication that provision was made for the payment of the Pick claim out of the proceeds of the refunding loan. Indeed, the record affirmatively shows that no provision was made in the loan account for the payment of the Pick items (R. 499).

So that if we assume that the circular amounted to a misrepresentation the remedy of the bondholders would have been an action not against the indenture trustee to compel it to obtain all of the trust estate which was to have been delivered to it—for it already had all the trust estate—but an action against the underwriters for misrepresentation.

Such an action is personal to the bondholder and would lie against Cody Trust Company or the Chicago Trust Company, according to which underwriter sold the bond. Among the conditions precedent to recovery would be that the purchaser show that the misrepresentations related to a material matter, that he saw the circular which contained it and relied upon it in purchasing his bond.

In 1931 Chicago Trust Company and Central Trust Com-

pany of Illinois consolidated under the state banking laws to form Central Republic Trust Company, which by operation of law became liable for all and any liabilities of Chicago Trust Company.

On November 20, 1934 by action of the Auditor of Public Accounts of the State of Illinois a receiver was appointed for Central Republic Trust Company which as far back as June of 1932 was heavily indebted to Reconstruction Finance Corporation *to which it had pledged all of its assets.*

Later the receiver resigned the trusteeship on behalf of Central Republic Trust Company and on January 3, 1935 City National Bank and Trust Company of Chicago, *an entirely separate and distinct corporation,* a national banking association, was appointed successor trustee by order of the state court.

This being so, what possible connection with, or responsibility for, the underwriting or the circular misrepresentation would the successor trustee have? We have heretofore discussed under Point I (d) what knowledge the City National Bank and Trust Company of Chicago, the committee and their attorneys had about the circular or its contents. But supposing that they had knowledge, no duty or liability would have been imposed upon the bank, the committee, or their attorneys.

Immediately upon the appointment of the City National Bank and Trust Company of Chicago it secured from the receiver of its predecessor in trust all of the trust estate consisting of the land, the building, and all furniture, furnishings and equipment therein on which at that time there *was* a chattel mortgage as additional security (R. 509). Later, when the account filed by the receiver on behalf of Central Republic Trust Company was approved by the court, City National Bank and Trust Company of Chicago, as successor Trustee, obtained all of the funds in the trust

amounting to $9,995.45 (R. 114). So that the successor Trustee fully performed all of its duties and obligations in this regard and it continued to do so until the property was turned over to the federal court.

Cody Trust Company went into receivership in December of 1933 (R. 479).

But it is suggested by the court trustee that on some undisclosed theory City National Bank and Trust Company in January of 1935 or thereafter should have proceeded against the "former fiduciaries", meaning thereby, we suppose, Cody Trust Company and Central Republic Trust Company.

By virtue of what power or right? Does petitioner mean that the successor Trustee under the trust deed, in the absence of an express power therein contained, acquires the right to sue the underwriters on account of misrepresentations made to the purchasers of the bonds? And if so what would be the nature of the action and for whose use and benefit? Would it be for the bondholders or for only those who saw the circular and relied upon it and just who were they? How much would the judgment be for, and again for whose use and benefit? What would be the likelihood of successfully prosecuting such an action to judgment, the Illinois statute of limitations, of which the court will take judicial notice, being five years commencing September of 1928, the date of the sale of the bonds? And again, what prospect of recovery on any judgment obtained to justify the expense of the proceeding?

Another theory advanced by petitioner in the court below and again advanced here to establish the liability of City National Bank and Trust Company in connection with the Pick litigation is that the Central Republic Trust Company practiced fraud upon the state court in inducing it to sanction the purchase by the receiver of the fixtures and equipment in Granada Hotel and owned by Pick with-

out making full disclosure of all of the facts and that City National Bank and Trust Company, as the successor Trustee, had the duty to cause Central Republic Trust Company to account for the moneys so spent by the receiver.

This contention of the petitioner is predicated on the theory that the $22,500 paid in the Pick settlement was not in fact paid for the furniture but that the real consideration for the payment was the dismissal of the pending action for damages on the surety bonds in the Wenstrand suit in the federal court. We have set forth the facts in relation to that transaction in detail in our Statement of the Case and there pointed out that the price to be paid for the furniture in cash was agreed on before the arrangement for raising the necessary funds by receiver's certificate was made.

In support of this theory the petitioner called to the stand the witness Lenz (R. 262), who testified that the value of the built-in kitchen cabinets and china cases and of the ozite and carpets torn out of the building and removed to the street would be $3,392.30 (R. 265). As the testimony shows, the witness Lenz was not qualified, and before visiting the premises had been instructed by the judge "to make a report of valuation of the property in question during the year 1933 for removal purpose, or in other words for a forced sale" to an outside buyer, rather than a valuation based on cost of replacement less depreciation (R. 267).

The respondents' witnesses, Young (R. 420, 640), and Murphy (R. 421, 640), were prepared to establish through an appraisal which the court did not admit in evidence that the value of the furniture was $18,000, based on cost of replacement less depreciation. The $22,500 was paid on account of the furniture, its rental value for about three years, and the release of a deficiency decree in the suit to foreclose the chattel mortgage.

We thus see that the two bases on which the petitioner predicated this theory, namely, first, that the furniture merely had a value of $3,392.30 and therefore most of the consideration must have been paid for something else, and, second, that a fiduciary is presumed to have acted in breach of his duty, are respectively unsupported and unsupportable.

Furthermore, this is the very transaction which was approved by the Circuit Court of Appeals for the Seventh Circuit in the case of *Indemnity Insurance Company of North America* v. *Granada Apartments, Inc.*, 104 Fed. (2d) 528 (certiorari denied 308 U. S. 557).

Among the fact findings to which we assigned error are 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 28, 29, 31, 36, 37, 44, 45, 47, 51, and 57, which appear at R. 769-790. The essential part of each and every one of those findings is negatived and nullified by the decision in that case.

(f) *Since the complaint made by the petition for certiorari goes to the action of the Court of Appeals in making any allowances and not to its right to increase allowances, the latter question is not presented.*

The opinion of the Circuit Court of Appeals in part said:

> "We have examined the claims submitted by the City National and the Committee on what is designated as out-of-pocket expenses and we see no reason why those claims should not be allowed in full. As to all other claims for compensation and fees for services rendered in connection with reorganization proceeding, the amounts mentioned by the Court are inadequate and the Court should determine and fix what is a reasonable and customary charge for services thus rendered." (R. 967.)

Neither petitioner's statements of the reasons relied on for the allowance of the writ, nor any other part of the petition for certiorari questions the right of the Circuit

Court of Appeals to increase fee allowances or the propriety of the directions which the Circuit Court of Appeals gave to the District Court in reference to the claims for compensation and expenses in this case.

If the Court be of the opinion that the District Court was in error in denying all compensation and expenses of respondents, it is suggested that the direction of the Circuit Court of Appeals in reference to the amount of the allowances should not be disturbed.

II.

THE UNITED STATES CIRCUIT COURT OF APPEALS DID NOT REVERSE ANY OF THE FINDINGS OF THE TRIAL COURT WHICH WERE NOT CONTESTED.

In petitioner's Point II, he urges that the Circuit Court of Appeals departed from due process of law and denied him his day in court by reversing findings of fact which were admitted by respondents, and by making new findings of fact on questions not raised in the Circuit Court of Appeals.

The findings and parts of findings to which error was not assigned are indicated in petitioner's Appendix "D", but in most instances the admitted portions of the findings are not quoted, so that it is impossible to ascertain what story is told thereby without setting them down in a connected narrative.

To assist the court in this regard and to lighten its burden, we have performed that task at Appendix "A" of this brief. Appendix "A" is not a verbatim copy of the findings and portions thereof in question. It does, however, contain everything that could conceivably have any bearing whatsoever on petitioner's contention, and those parts most unfavorable to respondents are set out in the exact verbiage used by petitioner in preparing the findings.

As a reading of Appendix "A" or of the admitted findings themselves will disclose, all of the facts therein found which could possibly have anything to do with the issues involved, are set forth by us in our statement of facts in the fore part of this brief.

We contended in the Circuit Court of Appeals, and contend here, that the admitted facts do not show any breaches of trust or failure in fiduciary duty which warrants disallowance of respondents' fees, and that the contested findings are clearly erroneous. In reversing the lower court, the Circuit Court of Appeals did not, as petitioner contends, reverse the admitted findings, but merely agreed with our contention.

At page 72 of his brief, petitioner says:

> "The Circuit Court of Appeals went so far as to quote one of these partially admitted findings in order to prove to itself that the trial court committed error."

Petitioner's reference is to that part of the opinion of the Circuit Court of Appeals at R. 966-967, where the court quoted part of finding 56—not in order to prove to itself that the trial court committed error as petitioner contends,—but in order to show that no definite determination was made by the lower court as to the amounts which respondents would be entitled to if they were to be allowed fees.

The charge at page 73 of petitioner's brief that the Circuit Court of Appeals proceeded without notice to write new findings of facts on questions not raised in that court presumably refers to the contention made in more detail at page 13 of his petition for certiorari, where he said:

> "One of the surprise issues used by the Court of Appeals was that of 'conspiracy.' The Opinion of the appeal court stated:
>
> > 'Thus, we conclude there is no justification for charging City National with these various items, with the exception of what we have said with reference to Item III. In reaching this conclusion,

> we are not unmindful of the rule which requires us to accept findings of the trial court supported by substantial evidence. Here, however, they are predicated upon a theory of the existence of a conspiracy to which appellants were parties. We are satisfied no such conspiracy was proven.'
>
> Obviously conspiracy could not be the substantive basis for a cause of action. Civil conspiracy at most is aggravation of damages. It is never a cause of action. *Dean* v. *Kirkland*, 301 Ill. App. 495, 504. More than this however, 'conspiracy' was not pleaded, argued or briefed by any party to the appeal below. It was not an issue in either court. But the Court of Appeals makes the lack of 'conspiracy,' a determining factor upon which a reversal of the trial court's findings is based. No notice or hearing was given this petitioner upon this surprise issue."

It would be interesting to have the Court Trustee explain why he represented in his petition for certiorari that this was a surprise issue neither pleaded, argued nor briefed and why he now makes that claim again in his present brief in view of Paragraph 26 of the findings,* which he himself prepared, and in view of his brief in this case in the Circuit Court of Appeals, where he stated, at page 3 thereof:

> "The Codys desired to defeat the Pick claim. Lawyers advised them it could be done. They set about to do it. They promised Chicago Trust Company that they would set aside $50,000 face value of the 1928 Granada Second mortgage issue as a safety fund, and would indemnify Chicago Trust Company. They persuaded Chicago Trust Company to sign the agreement (R. 536) for all this. That agreement reveals the heart of the present controversy. * * *
>
> These trust companies used endless devices, lawyer-made, in the attempt to defeat the Pick claim, to dress it up in new ways, to prevent the bondholders from

* "When we look at the whole evidence as equity looks at evidence we reach the same results. Respondents and I. I. C. N. A. with knowledge participated in a conspiracy, the effect of which was to use the bondholders' money a second time to purchase furniture and personal property for the Granada Hotel. The details of this conspiracy appear from beginning to end of the record."

discovery of the true situation, to use bondholders' money, current Granada income, to pay a second time for the furniture which the bondholders had bought and paid for in 1924, and again were assured in 1928, remained as part of the security for their new bonds. These devices and litigations have continued for ten years."

As we have heretofore shown in our statement and analysis of the pleadings, there are surprise issues in this case which were never raised below, but they have been raised by petitioner, not by the Circuit Court of Appeals.

III.

THE UNITED STATES CIRCUIT COURT OF APPEALS CAREFULLY ANALYZED THE EVIDENCE AND PROPERLY APPLIED RULE 52 OF THE RULES OF CIVIL PROCEDURE.

The Court Trustee says that the Circuit Court of Appeals overruled the findings of the trial court without first having analyzed the evidence. If petitioner means that the court failed to discuss *pro* and *con* all the evidence bearing upon each and every issue in the case and lay bare the mental processes by which it reached its conclusion that the essential allegations of petitioner's pleading were not sustained, then we do not agree that a court has any such duty. The fact is, as disclosed by the opinion, that the court—at great trouble and without the assistance from petitioner which it was entitled to expect—did carefully review the record and consider the evidence on each point before deciding that such findings as were necessary to support the decision of the District Court were clearly erroneous (R. 958).

As the court of course knows, prior to the adoption of Rule 52 of the Rules of Civil Procedure, the power of a reviewing court to reverse findings of fact on writ of error or appeal in a law case and in an appeal in an equity case

were dissimilar. Rule 52 makes applicable to both law and equity cases the prior equity rule. (See cases cited under this point.)

In support of his Point III, petitioner, under his Points and Authorities, cites the single case of *Dooley* v. *Pease,* 180 U. S. 126, but in footnote 344 under his argument on Point III, adds four cases which he says are to the same effect as *Dooley* v. *Pease.*

The cases of *Dooley* v. *Pease, H. H. Cross Co.* v. *Simmons,* 96 Fed. (2d), 482, and *U. S.* v. *Tyrakowski,* 50 Fed. (2d) 766, arose at common law before the adoption of the Rules of Civil Procedure.

In re Peacock Food Markets, 108 Fed. (2d) 453 was an equity case. The court reviewed the conflicting evidence and said:

> "We believe there was *substantial* evidence to support the finding that the mortgage was given by the bankrupt and received by the claimant to actually hinder, delay and defraud creditors of the bankrupt." (italics ours)

In *Scavenger Service Corp.* v. *Courtney,* 85 Fed. (2d) 825, an equity case, the court found the testimony on the two sides in such sharp and utter contradiction that there was no decisive factor other than the relative credence to be given the opposing witnesses. In this situation it affirmed the finding.

Petitioner's queer concept of the duty of a reviewing court is clearly set forth in paragraphs 4 and 5 of his petition for rehearing (R. 976) in which he says that the reviewing court should search the records for itself—without assistance from him—and then, before setting aside any finding, demonstrate by its opinion that there is an absence of conflicting evidence. In his 90 page brief in the Circuit Court of Appeals, 38 pages of which are devoted to a reiteration of the findings and a discussion of the Statute of

Gloucester, he, himself, stated that he could not, within the limits of a brief, make the very analysis which he expects the court to make in its opinion.

Petitioner also states that when the Court of Appeals came to the question of fees, it merely said:

> "We have concluded those findings were without substantial support."

The reference is to Record 453, but the quoted portion is to be found at Record 969. The Court of Appeals was not referring to a question of fees; it was talking of items contained in Finding 55 (R. 789) on account of which the Court Trustee was seeking recovery by way of counterclaim and the quoted conclusion was preceded by a careful analysis and discussion of every one of those items.

The court, however, does speak of other findings at Record 958, where it says:

> "Appellants and others are charged with having knowingly participated in a conspiracy to defraud the bondholders. The findings are of such serious character that we have read and reread them and searched the record with a view of endeavoring to ascertain if they find support."

and at page 965 the court states:

> "In reaching this conclusion, we are not unmindful of the rule which requires us to accept findings of the trial court supported by substantial evidence. Here, however, they are predicated on a theory of an existence of a conspiracy to which appellants were parties. We are satisfied no such conspiracy was proven."

Of course, the court did not designate, by number, which findings it was sustaining and which findings it was overruling, but, as is usual, overruled such findings, and only such findings, as were necessarily contrary to the conclusions which it reached.

IV.

THE UNITED STATES CIRCUIT COURT OF APPEALS DID NOT ERR IN DENYING THE COURT TRUSTEE'S MOTION TO DISMISS APPEALS 7060 AND 6986.

The Court Trustee's motion to dismiss appeal 7060 taken *as of right* was predicated on the proposition that the appeal involved only the question of fee allowances, and that since the decision in *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, such appeals may be taken only by leave; and also on the further proposition that ever if questions other than fee allowances were involved so that an appeal by right was necessary, it was not perfected within the time or in the manner provided by the law and the rules then in effect.

The Court Trustee's motion to dismiss Appeal 6986, *the appeal by leave*, was based on the proposition that the mode or method for perfecting an appeal by leave is prescribed and controlled by the Rules of Civil Procedure and that the appeal was not perfected within the time or in the manner provided by the later rules.

Both appeals were taken by us from the decree entered May 2, 1939, and from the findings of fact which by reference had been incorporated into that decree. The decree disposed of issues which arose on the final report and account of City National Bank and Trust Company of Chicago, as Indenture Trustee, on the claim of City National Bank and Trust Company of Chicago in its own behalf, on the petitions for fees and expenses of administration filed by the Committee and its counsel, the objections of the Court Trustee to all of the foregoing and upon the counterclaim of the Court Trustee seeking to surcharge the Indenture Trustee with substantial sums for alleged wrongful acts and omissions in the management and operation of

the mortgaged premises. Quite aside from the question of fee allowances findings were involved, in themselves prejudicial to the appellants, on which the Court Trustee was seeking to recover large sums in his appeal 7061.

Moreover, at the time the appeal was taken, the Circuit Court of Appeals for the Second Circuit in *London* v. *O'Dougherty*, 102 F. (2d) 524 had held that the proper method to appeal on fee questions was by notice under the Rules of Civil Procedure. Shortly after we had perfected the appeal by right the Circuit Court of Appeals for the Seventh Circuit *in re Albert Dickenson Co.*, 104 F. (2d) 771, held that as to fee questions appeals were only by leave.

As the question of fee allowances and expenses could have been raised only by an appeal by leave and as all of the other matters as to which the appeal was sought could have been raised only by appeal by right, it was necessary to appeal both ways.

The fact that the appeal by leave raised other questions in addition to those involving fee allowances was not grounds for dismissal of that appeal, nor was the fact that the appeal by right included the question of fee allowances ground for its dismissal, since there were questions left for review which could only be reviewed by appeal taken in that manner. There is, therefore, no basis for the contention that by appealing by one method we were estopped to appeal by the other.

As to the appeal by right, we admit that it is governed by the Federal Rules of Civil Procedure, particularly Rules 73 and 75.

In that appeal, that is the one by right, number 7060, we filed our notice of appeal on June 1, 1939 (R. 796) or within thirty days of the date of the entry of the decree appealed from. Accordingly under Rule 73(g) we were required within forty days of June 1, 1939 to file the record

in the United States Circuit Court of Appeals unless the District Court granted further time on motion made within the forty-day period.

The claim of the Court Trustee was that the record not having been filed until August 19, 1939 which was more than forty days after the filing of the notice of appeal, there was no compliance with the rule and accordingly the appeal was not perfected.

As the Court Trustee well knows, on July 7, 1939 the District Court did extend the time. The order does not appear in the printed transcript here but it is admitted by the Court Trustee; for in motion to dismiss, made in the Circuit Court of Appeals, he said, *"On July 7, 1939 appellant secured an order in the District Court extending time until August 19, 1939 for docketing said case on appeal; and within said time did so docket said appeal in said Court of Appeals as Case No. 7060"* (R. 888). See also original transcript of record from the Clerk of the District Court, pages 477 and 478, at which the order of the District Court appears.

Why didn't the petitioner inform the Court of this fact in presenting his "Reasons One, Three and Four" at page 78 of his brief? We have called attention to the fact each time that he made the motion to dismiss.

It is manifest that the record on the appeal by right was filed strictly in accordance with the Federal Rules of Civil Procedure.

While it is true that the Federal Rules of Civil Procedure superseded all rules of the Circuit Court of Appeals which were conflicting, the fact remains that the Federal Rules of Civil Procedure relate only to appeals by right and are entirely silent as to appeals to be taken by leave. An examination of Rule 73 confirms this assertion.

It follows that the procedure on appeals by leave was

controlled by the rules of the United States Circuit Court of Appeals for the Seventh Circuit in effect at the time the appeal by leave was taken and allowed. Those rules remained in effect until November 10, 1939, when the present rules of the United States Circuit Court of Appeals for the Seventh Circuit became effective.

What then were those rules and what did they provide? le 13, Section 1, provided among other things that the nscript should be filed with the Clerk of the Court of Appeals on or before the return day specified in the citation unless the time was enlarged by a judge of the District Court or by the Court of Appeals or some judge thereof. Section 3 of Rule 13 provided that the citation must be returnable within thirty days from the date on which the appeal was allowed, which it was in this case (R. 834). On June 12, 1939 we petitioned the Court of Appeals for leave to appeal. On June 22, 1939 leave was allowed and citation issued returnable July 22, 1939. Accordingly, the record was due in the Court of Appeals on July 22, 1939, but on July 19, 1939, a short record having been filed, we made a motion in the Court of Appeals to enlarge the time for the filing of the full record, which was allowed on July 21, 1939 and the time extended to September 16, 1939 (R. 873). On August 19, 1939 we filed a full record in appeal 7060, the one taken by right. That having been done, on September 8, 1939, within the time as enlarged for filing a full record in appeal 6986, we moved in each case that the two appeals be consolidated and that the record filed in the appeal by right, together with the short record filed in the appeal by leave, stand as the record in both cases (R. 876). The order was that appeal 6986 and 7060 be consolidated as Cause No. 6986; that the transcript of record filed with the Clerk in 6986 and the transcript of record filed in 7060 be consolidated and stand as the single consolidated transcript of record in both of said appeals as so consolidated (R. 920).

Even if by any possibility the Federal Rules of Civil Procedure rather than the then existing rules of the Court of Appeals controlled appeals taken by leave, the Court Trustee's contention that that appeal should be dismissed because the record was not filed within the time fixed by the Federal Rules of Civil Procedure would be without merit; for it is a familiar rule of this Court that if an appellant fails to file his record on time, the appellee may have the cause docketed and dismissed. If, however, the appellant files his record late but before the appellee has moved for dismissal there is no penalty. The present Rule 11 of the Court of Appeals as adjusted to conform to the Federal Rules of Civil Procedure is substantially to the same effect.

Since the appeal by leave was taken, the United States Circuit Court of Appeals for the Seventh Circuit amended its rules effective November 10, 1939. Presently Rule 31 controls appeals in bankruptcy cases where they are discretionary. Section 3 of Rule 31, among other things provides that if the appeal is allowed the petitioner is to file his transcript of the record within twenty-five days from the date of allowance unless the time is enlarged by the Court of Appeals or a judge thereof. So that even now, the Rules of Civil Procedure do not contain provisions relating to appeals by leave but those appeals are controlled by the rules of the various Circuit Courts of Appeals.

The Trustee further contends that if appeal 7060, the one by right, were invalid and had been dismissed, appeal 6986 would also have to be dismissed because there would then be a good appeal dependent entirely on the record in a bad appeal, which had been dismissed carrying the record with it.

The contention is without merit. By the terms of the consolidation order, the single consolidated record was just

as much a part of appeal 6986 as it was of appeal 7060, and after dismissal of appeal 7060 the record would remain the record in appeal 6986.

V.

THE UNITED STATES CIRCUIT COURT OF APPEALS DID NOT RULE THAT THE DISTRICT COURT WAS WITHOUT POWER TO REVIEW, READJUST AND DISALLOW FEES ALLOWED BY DECREE OF THE STATE COURT.

Whether prior to the Chandler Act a Court of Bankruptcy could review fee allowances that were fixed by final decree in a State Court foreclosure proceeding is a question which was neither involved nor decided by the Circuit Court of Appeals.

The quotation from the opinion of the Circuit Court of Appeals at the bottom of page 81 of petitioner's brief shows that that court found that claimants had waived any right which they might have had under the then bankruptcy act to insist on the binding effect of the State Court decree as to the allowances there made and had submitted to the District Court for consideration the question of their reasonableness. Furthermore, the remanding order expressly directs the court to fix reasonable fee allowances for all services performed including those in the State Court.

The remarks contained in the first three quotations on page 81 of petitioner's brief, as admitted by petitioner, were made by the Circuit Court of Appeals in reference to items in the counterclaim of the Court Trustee which were not fee allowances and any law that fee allowances are reviewable is of course not applicable to those items. As the Circuit Court of Appeals pointed out, the amounts there under discussion, if allowable at all, could not be reduced, but could be disallowed *in toto* in case of fraud which it found did not exist. (R. 962.)

Nor did the Circuit Court of Appeals hold that a bankruptcy court never has the power to disallow *in toto* fee claims of parties whose claims have been allowed by a State Court but may only determine their reasonableness. On the contrary, it held that in this case there was no fraud and hence it was error to deny fees *in toto*. And of course, granting a right to deny fees entirely, it would be error to do so unless there were just cause.

The implication at page 82 of petitioner's brief that the State Court never fixed the amount of fees because it refused to approve City National's accounts is of course without basis as the allowances were fixed by the decree, not by the account. See paragraph 12 of the decree. (R. 511.)

Conclusion.

The petitioner's demand that all the fees and expenses of respondents be denied was predicated on asserted breaches of trust of so serious a character that their proof might well have serious results.

Stripped of collateral matter, petitioner's claim is that respondents, being responsible and liable for misrepresentations to the bondholders, entered into a "conspiracy" to use the funds of the trust estate to avoid the consequences of their own wrongs.

One would suppose that a "Court Trustee"—in a position calling for the exercise of fairness and impartiality—would not make charges of the kind here made without careful preliminary investigation and reasonable certainty that there were ample grounds to sustain them.

For, unlike a private litigant who must pay the costs of litigation groundlessly or maliciously initiated by him, the expenses of a court trustee's suit must be borne by the estate if he is unsuccessful.

That is the reason for the rule that a trustee who engages

in litigation and acts as his own attorney therein must forego all fees for his legal services. It is a salutary rule—the result of long experience with the consequences of natural human weakness.

In the instant case the Trustee has acted as his own counsel in numerous pieces of litigation, most of which have reached this court and in all of which he has been unsuccessful.

Weightstill Woods, Court Trustee, Petitioner, v. *Indemnity Insurance Company of North America,* 308 U. S. 557.

Weightstill Woods, Court Trustee, Petitioner, v. *Granada Apartments, Inc., et al.,* 308 U. S. 639.

In re Granada Apartments, Inc., 104 Fed. (2nd) 528.

In re Granada Apartments, Inc., 111 Fed. (2nd) 834.

He has been allowed on account of his services in matters other than the collateral litigation the sum of $7,500 (R. 962), which figures roughly at the rate of $10 per hour. He has filed a petition with the District Court in which he asks compensation for the collateral litigation, and shows thereby 3,722 hours spent on those matters and estimates that they will require 200 hours more.

The result of that litigation has been that, although the plan of reorganization was formulated, presented, and confirmed within about two months after the filing of the petition, nearly four years have elapsed and the final decree has not yet been entered.

We respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

VINCENT O'BRIEN,
JOHN MERRILL BAKER,
TRACY WILSON BUCKINGHAM,
(DEFREES, BUCKINGHAM, FISKE & O'BRIEN),
Counsel for Respondents.

APPENDIX "A."

Findings 1—10.

Relate to filing and approval of 77B petitions, appointment of court trustee, and to the pleadings, and proceedings had thereon.

Findings 11—57.

In 1924 Chi. Trust Company underwrote separate bond issue constr... on loans respectively made by three corporations owning the Granada, Arlington and Lincoln Park Manor hotels.

Granada contained a plant which provided heat, refrigeration, hot and cold water for its own needs and to the other hotels, which service it was still furnishing when these 77B proceedings were instituted. It contained a large amount of public space, including a solarium, writing room, ballroom and lobby which had for many years been used by guests of all three hotels.

Albert Pick and Company supplied the furniture and equipment to the Granada on open account and chattel mortgage.

In 1928 a refinancing of the Granada was carried out by a new first mortgage of $525,000 (of which $25,000 was subordinated to the balance) and a second mortgage of $360,000. Chicago Trust Company underwrote forty per cent and Cody Trust Company sixty per cent of the new First Mortgage bonds. Chicago Trust Company was named as trustee in both the first and second mortgage trust deeds.

The prospectuses issued by Chicago Trust Company and by Cody Trust Company stated that the security included the furniture and fixtures at the Granada Hotel.

In 1929 Granada Hotel Corporation conveyed sundry assets to Granada Apartments, Inc., debtor, which assumed the 1928 first and second mortgages but not the Pick chattel mortgage, which was not paid off out of the proceeds of the 1928 loans. Granada Apartments, Inc. from the beginning was officered by employees of Cody Trust Company and was wholly under its control.

In 1928 Albert Pick and Company obtained a decree to foreclose its chattel mortgage. Cody Trust Company, by Wenstrand, its nominee or employee, brought suit in the Federal Court to enjoin sale under that decree. A temporary injunction issued, but Pick ultimately prevailed June 2, 1930, and then filed suggestions of damage against plaintiff, Wenstrand, and the surety, Indemnity Insurance Company of North America.

Pick intervened in foreclosure proceedings on the Granada pending in the Superior Court of Cook County, Illinois, and asked that the Receiver there surrender possession of Pick's property. In August, 1930, the Receiver surrendered the furniture, but the Superior Court reserved and thereafter determined in favor of Pick the question of whether the equipment, to wit, inador beds, carpets, china cabinets and other items, were fixtures and thus part of the real estate or personalty covered by the Pick chattel mortgage. In 1933 its decree was affirmed after an appeal to the Appellate Court of Illinois and certiorari to the Supreme Court of Illinois.

Pending these proceedings new furniture was purchased for the hotel under a contract which through payment of Granada moneys had been reduced to $3,000 when these 77B proceedings were begun. Continental Illinois National Bank and Trust Company filed its claim for this item which the confirmed plan prepared and presented by respondents provided was to be paid in cash.

In July, 1931, Chicago Trust Company and Central Trust

Company of Illinois consolidated and became Central Republic Trust Company, which claimed to be successor trustee under the 1928 trust deeds. October 5, 1932, City National Bank and Trust Company was organized and took over the deposit liabilities of Central Republic Trust Company.

When, in the Superior Court foreclosure proceedings it was determined that Pick could remove its equipment claimed to have been fixtures, $21,500 was paid it for equipment and $2,000 was paid to Defrees, Buckingham, Jones & Hoffman as attorneys' fees. These payments were authorized by order of the Superior Court. Of the moneys so paid $13,000 was provided from Granada funds and $11,500 from the proceeds of a receiver's certificate of indebtedness purchased by Indemnity Insurance Company of North America on the understanding that the suggestion of damages pending against it would be dismissed by Pick. Thereafter $7,500 was paid from Granada funds reducing the certificate to $4,000, for which, with interest, claim was made in the 77B proceedings by Indemnity Insurance Company of North America. The Superior Court was not informed of the suggestion of damages or of the proposed dismissal thereof. Until in the 77B litigation original documents were produced from the files at the home office of Indemnity Insurance Company of North America it was not known to any court or Granada creditors that officials of Cody Trust Company and Wenstrand had agreed to purchase the receiver's certificate if it was not paid off, nor that Wenstrand and others were indemnitors upon the bonds in said injunction proceedings.

Wenstrand had signed the first mortgage bonds. He, Riddle and Cody were indemnitors to Indemnity Insurance Company of North America, which had been told that the Wenstrand injunction suit was in reality for Cody

Trust Company; Cody Trust Company had agreed to remove the Pick chattel lien as between Cody Trust Company and Chicago Trust Company; and Cody's and Chicago Trust Company both had in 1928 represented to the bondholders that the furniture and personal property of the Granada was part of the security.

All the litigation prior to August, 1933, had affected only the second mortgage trust deed. In that month the crossbill to foreclose the first trust deed was filed and the receiver's certificate was asked for. The foreclosure decree was not entered until December 18, 1936. The last interest paid to first mortgage bondholders was for 1931.

Until January 12, 1934, Chicago Title and Trust Company was only a custodian of net rents paid to it. By order of that day for the first time it was directed to take possession of the property. Before that it was forbidden by court order to do so.

Cody Trust Company went into receivership about December, 1933. In March, 1934, the receivership (the foreclosure receivership—not that of Cody Trust Company) was terminated by order of the Superior Court, which turned the property over to Central Republic Trust Company, trustee under the first mortgage, and allowed the receiver $3,000 for services.

Central Republic Trust Company went into receivership near the end of 1934. Thereupon an order was entered by the Superior Court purporting to have the Central Republic Trust Company and its receiver resign the trusteeship under the 1928 Granada trust deed and upon motion and petition of the Committee appointing City National Bank and Trust Company successor trustee.

The Committee had been organized in April, 1933, by and among minor officers, employees and nominees of City National Bank and Trust Company. Claims were filed in these 77B proceedings upon Granada 1928 second

mortgage bonds by various Chicago banks, who held them as collateral for loans to Cody Trust Company.

Respondent attorneys have been active in all of these matters since 1924 and have had to do with most of these litigations. It does not appear that City National or anyone tried at any time to have the Codys, the Cody Trust Company or its officers, Chicago Trust Company or its officials or any successors or receivers for them, or Wenstrand and the other indemnitors perform their promises and duties to the Granada property and the Granada bondholders.

On October 5, 1932 City National took over from Central Republic and now continues as part of its Trust Department a personnel organized and called the Corporate Reorganization Division. The names of Committee members are chosen from among employees or officers of City National.

This method was pursued with relation to the Arlington and Lincoln Park Manor Hotels. The Arlington has been reorganized through a foreclosure in the Circuit Court. The Arlington, Inc. is a new corporation set up for that property. The Lincoln Park Manor is still in process in that Court. City National was trustee under the Arlington and Lincoln Park Manor issues.

The Committee when formed by City National for the Granada included representation for Cody Trust Company and two secretaries were appointed, one with relation to the bondholders' list of Chicago Trust Company and the other in relation to the bondholders' list of Cody Trust Company.

The minutes of the Granada Committee do not show that any constructive action was ever taken looking toward a reorganization of the Granada property prior to the discussion in the present 77B proceedings, except there

* See testimony Johnson re action not reflected in minutes. (R. 436.)

was a refusal to accept an offer of twenty cents on the dollar for bonds on deposit with the Committee and City National as its depositary.

City National claimed to be trustee under the 1928 first mortgage trust deed. The fullest control was taken over all manner of personal property, including notes and other securities representing general moneys due to the debtor's estate. In relation to the proceedings in *Tuttle* v. *Harris* in the United States District Court, the Circuit Court of Appeals and the United States Supreme Court (297 U. S. 225) they took and maintained the position that they were trustee in possession and free from court control, and to pay themselves for doing so they appropriated about $4,000 of Granada money.

City National Exhibit X was prepared by Defrees, Buckingham, Jones & Hoffman, attorneys, who in this accounting litigation represent the City National, the Committee and the Arlington, Inc. They filed the Thuma foreclosure in 1930. They withdrew as counsel for Thuma and appeared on the opposite side of the record as counsel for Chicago Trust Company, the Bondholders' Committee, and then the City National. Throughout they have represented the Committees on the Granada, Arlington and Lincoln Park Manor properties and the City National as Trustee therefor. Neither they nor the Committee nor the Trustee presented any plan at any time for the joint operation or unit reorganization of the three properties. From that time these properties were bondholders' equities.

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